

AA 000 695 820 1



UC SOUTHERN REGIONAL LIBRARY FACILITY

P. T. HANNIGAN
1018 1/4 So ARDMORE AVE.
LOS ANGELES.

P. E. H. S. T. S.
Feb 1926.

PHONE: FITZROY 3432



UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

I. Marriage.

1. History

1st The Canon Law was the basis of the law of Eng. & was adopted in the U.S. as a form of common law. 79 Maryland 298.

2. Definition: Civ. Code 55.

1st The marriage rel. is a status and marriage a change of status 137 Cal 26

2nd Marriage is a contract only in its inception Civ. Code 55.

3rd It is within the legislative power to regulate and control marriage. 160 4. 21

3. The essentials of marriage.

1st There must be mutual consent between the parties Civ. Code 82

1st Without fraud

1st Marriage is voidable where performed by another at time of marriage is done.

1st Cal App. 285 - 13 Cal 87 - 37 Pac

1st But not for immaturity alone.

1st Cal 87

1st Civ. Code 62

Marriage consent is given for marriage.

2nd Under influence over minors and persons of weak mind as ground for annulment.

3rd Marriage obtained by duress is void.

194 Cal 391

4th Marriage is voidable for mistake of identity, but not as to fortune, rank, character or health or even frankness of representation, consent.

5th Hasty in fulfilling the time of marriage and to contract 161 Cal 380

6th Anteriority at the time of marriage may avoid it because there is no real consent.

161 Cal 380



Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

<http://www.archive.org/details/personsdomesticr00cool>

HORNBOOK CASE SERIES

ILLUSTRATIVE CASES
ON
PERSONS AND DOMESTIC
RELATIONS

BY ROGER W. COOLEY

PROFESSOR OF LAW, UNIVERSITY OF NORTH DAKOTA

AUTHOR OF "BRIEFS ON THE LAW OF INSURANCE," "ILLUSTRATIVE CASES ON
DAMAGES," AND "ILLUSTRATIVE CASES ON INSURANCE"

A COMPANION BOOK TO TIFFANY ON PERSONS
AND DOMESTIC RELATIONS (3D ED.)

ST. PAUL, MINN.

WEST PUBLISHING CO.

1913

T
1776ads
1913
WEST PUBLISHING COMPANY
CoOLEY P.& D.REL.)

GIFT
3-5-63
MM

THE HORNBOOK CASE SERIES

It is the purpose of the publishers to supply a set of Illustrative Casebooks to accompany the various volumes of the Hornbook Series, to be used in connection with the Hornbooks for instruction in the classroom. The object of these Casebooks is to illustrate the principles of law as set forth and discussed in the volumes of the Hornbook Series. The text-book sets forth in a clear and concise manner the principles of the subject; the Casebook shows how these principles have been applied by the courts, and embodied in the case law. With instruction and study along these lines, the student should secure a fundamental knowledge and grasp of the subject. The cases on a particular subject are sufficiently numerous and varied to cover the main underlying principles and essentials. Unlike casebooks prepared for the "Case Method" of instruction, no attempt has been made to supply a comprehensive knowledge of the subject from the cases alone. It should be remembered that the basis of the instruction is the text-book, and that the purpose of these Casebooks is to illustrate the practical application of the principles of the law.

3-11-68

WEST PUBLISHING COMPANY.

(iii)*

TABLE OF CONTENTS

Part I

HUSBAND AND WIFE

	MARRIAGE	Page
I.	Definition of Marriage.....	1
II.	Mutual Consent.....	6
III.	Reality of Consent.....	11
	1. Fraud	11
	2. Duress	15
IV.	Mental Capacity of the Parties—Insanity.....	17
V.	Same—Nonage	19
VI.	Capacity of Parties Otherwise than Mentally—Prior Marriage.....	24
VII.	Formalities in Celebration—Informal Marriages.....	25
VIII.	Conflict of Laws.....	35

RIGHTS AND DUTIES INCIDENT TO COVERTURE IN GENERAL

I.	Rights to Determine Family Domicile.....	41
II.	Torts of Married Women.....	44
III.	Torts Against Married Women.....	50
IV.	Action for Enticing or Alienation of Affection.....	52

RIGHTS IN PROPERTY AS AFFECTED BY COVERTURE

I.	Wife's Earnings.....	57
II.	Wife's Personality in Possession.....	63
III.	Wife's Choses in Action.....	64
	1. At Common Law.....	64
	2. Effect of Modern Statutes.....	66
IV.	Wife's Estates of Inheritance.....	69
V.	Estates by the Entirety.....	74

CONTRACTS, CONVEYANCES, ETC., AND QUASI CONTRACTUAL OBLIGATIONS

I.	Contracts of Wife.....	79
II.	Conveyances, Sales, and Gifts by Wife.....	80
III.	Contracts by Wife as Husband's Agent.....	84

WIFE'S EQUITABLE AND STATUTORY SEPARATE ESTATE	
	Page
I. Power to Dispose of Equitable Separate Estate.....	92
II. Power to Charge Equitable Separate Estate by Contract.....	95
III. Statutory Separate Estate.....	98
IV. Power to Dispose of Statutory Separate Estate.....	102
V. Power to Charge Statutory Separate Estate by Contract.....	105
 ANTENUPTIAL AND POSTNUPTIAL SETTLEMENTS	
I. Antenuptial Settlements.....	113
II. Postnuptial Settlements.....	119
 SEPARATION AND DIVORCE	
I. Agreements of Separation.....	124
II. Jurisdiction to Grant Divorce.....	127
III. Grounds for Divorce—Cruelty.....	131
IV. Same—Desertion	134
V. Defenses—Connivance	137
VI. Same—Condonation	139
VII. Same—Recrimination	141
VIII. Extraterritorial Effect of Divorce.....	144
 Part II	
 PARENT AND CHILD	
 LEGITIMACY, ILLEGITIMACY, AND ADOPTION	
I. Legitimacy of Children.....	157
II. Adoption of Children.....	161
III. Status of Illegitimate Children.....	164
 DUTIES AND LIABILITIES OF PARENTS	
I. Parent's Duty to Maintain Child.....	168
II. Contracts by Child as Parent's Agent.....	172
III. Parent's Liability for Child's Torts.....	174
 RIGHTS OF PARENTS AND OF CHILDREN	
I. Parent's Right to Correct Child.....	180
II. Custody of Children.....	182
III. Parent's Right to Child's Services and Earnings.....	190
IV. Emancipation of Children.....	193
V. Action by Parent for Injuries to Child.....	198
VI. Action by Parent for Seduction or Debauching of Daughter.....	204
VII. Gifts, Conveyances, and Contracts Between Parent and Child....	206

Part III**GUARDIAN AND WARD****GUARDIANS—SELECTION AND APPOINTMENT**

	Page
I. Selection and Appointment of Guardians by the Court.....	210
II. Jurisdiction to Appoint Guardian.....	212

RIGHTS, DUTIES, AND LIABILITIES OF GUARDIANS

I. Maintenance of Ward—Use of Principal of Estate.....	215
II. Change of Ward's Domicile by Guardian.....	217
III. Management of Estate—Guardianship as a Trust.....	217
IV. Same—Collection and Protection of Property.....	222
V. Same—Investments	230

**TERMINATION OF GUARDIANSHIP—ENFORCING
GUARDIAN'S LIABILITY**

I. Guardians' Bonds.....	240
--------------------------	-----

Part IV**INFANTS, PERSONS NON COMPOTES MENTIS, AND
ALIENS****INFANTS**

I. Infancy Defined.....	245
II. Privileges and Disabilities.....	246
1. Capacity to Sue and Defend.....	246
III. Contracts of Infants.....	249
IV. Same—Liability for Necessaries.....	257
V. Same—Ratification and Disaffirmance.....	262
VI. Same—Time of Avoidance.....	263
VII. Same—Who may Avoid Contract.....	270
VIII. Same—What Constitutes Ratification.....	271
IX. Same—What Constitutes Disaffirmance.....	276
X. Same—Return of Consideration.....	278
XI. Liability of Infants for Torts.....	282

PERSONS NON COMPOTES MENTIS AND ALIENS

I. Contracts of Insane Persons.....	289
II. Contracts of Drunken Persons.....	290
III. Aliens	293

Part V

MASTER AND SERVANT

MASTER AND SERVANT

	Page
I. Creation of the Relation.....	300
II. Termination of the Relation.....	303
1. Breach by Master.....	303
2. Breach by Servant.....	309
III. Remedies for Breach of Contract—Damages.....	314
IV. Rights, Duties, and Liabilities Inter Se.....	318
1. Right to Wages.....	318
V. Same—Master's Liability for Injuries to Servant.....	320
1. Defective Appliances.....	320
2. Assumption of Risk.....	323
3. Negligence of Fellow Servants.....	331

TABLE OF CASES

Page	Page		
Abrams v. United States Fidelity & Guaranty Co.	222	Fletcher v. People.	181
Arnold v. Limeburger.	71	Frost v. Frost.	74
Ball v. Lovett.	85	Gall v. Gall.	28
Beickler v. Guenther.	256	Gilmore v. Kitson.	182
Bergh v. Warner.	85	Gonackey v. General Accident, Fire & Life Assur. Corp.	280
Bernard v. Pittsburgh Coal Co.	246	Goodnow v. Empire Lumber Co.	267
Biggs v. St. Louis, I. M. & S. R. Co.	190	Grauman, Marx & Cline Co. v. Krienitz.	251
Bisbee v. Gleason.	240	Guilmartin v. Solvay Process Co.	338
Blaechinska v. Howard Mission & Home for Little Wanderers.	57	Haddock v. Haddock.	144
Booth v. Wilkinson.	217	Harris v. Spencer.	102
Brady, In re.	212	Harvey v. Briggs.	270
Brittingham v. Stadiem.	177	Hatch v. Hatch.	271
Cameron-Barkley Co. v. Thornton Light & Power Co.	290	Haynes v. Bennett.	276
Chace, Ex parte.	35	Hiett v. Hiett.	124
Choctaw, O. & G. R. Co. v. Jones.	323	Hussey v. Whiting.	186
Churchill v. White.	285	Ingalls v. Allen.	300
Clague v. Clague.	139	Iona Sav. Bank v. Boynton.	112
Clapp v. Inhabitants of Stoughton	69	Jerome v. Queen City Cycle Co.	309
Clothier v. Sigle.	88	Johnson v. Johnson's Committee.	66
Clow v. Brown.	119	Jordan v. Jordan.	63
Coursolle v. Weyerhauser.	249	Kellar v. James.	46
Craig v. Van Bebber.	278	Kilgore v. Rich.	257
Croan v. Phelps.	164	Kuhn v. Oglvie.	109
Cushman v. Cushman.	143	Lamar v. Micou.	217, 230
Damron v. Ratliff.	274	Lane v. Soulard.	80
Davidson v. Laughlin.	319	Lehman v. State ex rel. Miller.	293
Detroit Chamber of Commerce v. Goodman.	105	Lessoff v. Gordon.	174
Drummond v. Irish.	24	Lewis v. Lewis.	17
Duffy v. Williams.	215	Louisville & N. R. Co. v. Brown.	331
Eighmy v. Brock.	206	Lyon v. Lyon.	11
Elliot v. Elliot.	19	McCarthy v. Boston & L. R. Corp.	200
Ellis v. Ellis.	127	McCrady v. Pratt.	172
Evans v. Faircloth-Byrd Mercantile Co.	110	McKelvey v. McKelvey.	180
Farrar v. Bessey.	79	McMullen v. Dickinson Co.	314
Feiner v. Boynton.	84	Marquette Cement Mfg. Co. v. Williams.	335

	Page		Page
Mauldin v. Southern Shorthand & Business University.....	259	Skoglund v. Minneapolis St. R. Co.	50
Maynard v. Hill.....	1	Sorrells v. Matthews.....	200
Middleton v. Nichols.....	204	Sparks v. River & Harbor Imp. Co.	320
Mitchell v. Kelly.....	242	Spurlock v. Brown.....	113
Murphy v. Grand Rapids Veneer Works	329	State v. Clarke.....	245
Nelichka v. Esterly & Heineman Co. v. Hollander.....	318	State ex rel. Scott v. Lowell.....	22
Netherland-American Steam Nav. Nuding v. Urich.....	198	Steinfield v. Girrard.....	89
Phillips v. Lloyd.....	44	Swartwood v. Chance.....	289
Porter v. Powell.....	61	Tanner's Estate, In re.....	219
Price v. Price.....	141	Thomas v. Malone.....	161
Provost v. Provost.....	261	Trenchard v. Trenchard.....	131
Quinlan v. Lackawanna Steel Co.	168	Tully, In re.....	210
Rader v. Rader.....	41	Turner v. Shaw.....	92
Renfrow v. Renfrow.....	193	University of Michigan v. McGuckin	6
Rounds Bros. v. McDaniel.....	226	Viertel v. Viertel.....	137
Roush v. Griffith.....	157	Ward v. Ward.....	189
Scanlon v. Walshe.....	15	Watson v. Watson.....	134
Shoro v. Shoro.....	263	Weaver v. Glenn.....	247
Shroyer v. Pittenger.....	98	Webster v. Helm.....	95
Sidway v. Nichol.....	52	Wells v. Tyler.....	64
Sims v. Sims.....	136	Wharton v. Christie.....	303
		Wicker v. Durr.....	104
		Wuller v. Chuse Grocery Co.	262
		Young v. Muhling.....	282

†

HORNBOOK CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS

PART I HUSBAND AND WIFE

MARRIAGE

I. Definition of Marriage¹

MAYNARD v. HILL.

(Supreme Court of United States, 1888. 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.)

This is a suit in equity, brought by Henry C. Maynard and Frances J. Patterson against Hill and others to charge defendants as trustees of certain lands. Plaintiffs are the children of David S. Maynard and Lydia A. Maynard, who were married in Vermont in 1828 and who lived there as husband and wife until 1850. In that year the family moved to Ohio, and David S. Maynard, leaving his family there, went West finally settling in Oregon territory, in that part now (1888) included in the territory of Washington. In April, 1852, David S. Maynard settled on and claimed the lands in controversy under the act of congress of September 27, 1850 (9 Stat. 496, c. 76), providing for donations to actual settlers on certain public lands. In December, 1852, an act was passed by the legislative assembly of the territory of Oregon purporting to dissolve the bonds of matrimony between David S. and Lydia A. Maynard. Maynard subsequently married again.

¹ For discussion of principles, see Tiffany, Persons and Dom. Rel. (3d Ed.) §§ 1-3.

The plaintiffs claim the lands as heirs of Lydia A. Maynard. A judgment for the defendants having been affirmed by the supreme court of the territory of Washington (2 Wash. T. 321, 5 Pac. 717), the plaintiffs appeal.

Mr. Justice FIELD delivered the opinion of the court.² * * * The act of congress creating the territory of Oregon * * * vested the legislative power and authority of the territory in an assembly consisting of two boards, a council and a house of representatives. Act Aug. 14, 1848, c. 177, § 4, 9 Stat. 324. It declared that the legislative power of the territory should "extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." * * *

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature, which can properly be conducted by the judicial tribunals. Yet, such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual, such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity, or hopeless idiocy, or a conviction of a felony, which would render the continuance of the marriage relation intolerable to the other party, and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, it is not perceived that any principle should prevent the legislature itself from interfering, and putting an end to the relation in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with the rights of property vested in either party, a different question would be presented.

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of parliament and treated the subject as one within their province. And,

² Part of the opinion is omitted and the statement of facts is rewritten.

until a recent period, legislative divorces have been granted, with few exceptions, in all the states. * * *

The adoption of late years, in many constitutions, of provisions prohibiting legislative divorces would also indicate a general conviction that, without this prohibition, such divorces might be granted, notwithstanding the separation of the powers of government into departments, by which judicial functions are excluded from the legislative department. There are, it is true, decisions of state courts of high character, like the supreme court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of their state constitutions. Sparhawk v. Sparhawk, 116 Mass. 315; State v. Fry, 4 Mo. 120, 138. The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature. We are therefore justified in holding—more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession at the time the organic act of Oregon was passed by congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature.

* * *

The organic act extends the legislative power of the territory to all rightful subjects of legislation "not inconsistent with the constitution and laws of the United States." The only inconsistency suggested is that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the federal constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of the supreme court of the territory, to legislation by territorial legislatures, we are clear that marriage is not a contract within the meaning of the prohibition. As was said by Chief Justice Marshall in the Dartmouth College Case, not by way of judgment, but in answer to objections urged to positions taken: "The provision of the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." And in Butler v. Pennsylvania, 10 How. 402, 13 L. Ed. 472, where the question arose whether a reduction of the per diem compensation to certain canal commissioners below that originally provided when they took office, was an impairment of a contract with them within the constitutional prohibition; the court, holding that it was not such an impairment, said: "The contracts designed to be protected by the tenth section of the first article of that instrument are con-

tracts by which perfect rights, certain, definite, fixed private rights of property, are vested."

It is also to be observed that, while marriage is often termed by text writers and in decisions of courts a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

This view is well expressed by the supreme court of Maine in Adams v. Palmer, 51 Me. 481, 483. Said that court, speaking by Chief Justice Appleton: "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other." And again: "It is not then a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress." And the chief justice cites in support of this view the case of Maguire v. Maguire, 7 Dana (Ky.) 181, 183, and Ditson v. Ditson, 4 R. I. 87, 101.

In the first of these the supreme court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations; was regulated and con-

trolled by the sovereign power of the state, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the supreme court of Rhode Island said that "marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

In Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250, the question came before the court of appeals of New York whether an action for breach of promise of marriage was an action upon a contract within the meaning of certain provisions of the Revised Statutes of that state, and in disposing of the question the court said: "The general statute, 'that marriage, so far as its validity in law is concerned, shall continue in this state a civil contract, to which the consent of parties, capable in law of contracting, shall be essential,' is not decisive of the question. 2 Rev. St. 138. This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes, and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word 'contract' employed in the common law or statutes. In this state, and at common law, it may be entered into by persons respectively of fourteen and twelve. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community."

In Noel v. Ewing, 9 Ind. 37, the question was before the supreme court of Indiana as to the competency of the legislature of the state to change the relative rights of husband and wife after marriage, which led to a consideration of the nature of marriage; and the court said: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And

still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity."

In accordance with these views was the judgment of Mr. Justice STORY. In a note to the chapter on marriage in his work on the Conflict of Laws, after stating that he had treated marriage as a contract in the common sense of the word, because this was the light in which it was ordinarily viewed by jurists, domestic as well as foreign, he adds: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts." Section 108n. * * *

Judgment affirmed.

II. Mutual Consent³

UNIVERSITY OF MICHIGAN v. McGUCKIN.

(Supreme Court of Nebraska, 1901. 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917.)

Action by Charles E. Bates against Anna McGuckin, administratrix of Daniel McGuckin, and others. Judgment for defendants, and plaintiff brings error. The University of Michigan was thereafter substituted for plaintiff.

ALBERT, C.⁴ This action was brought by Elizabeth H. Bates against Daniel L. McGuckin and Anna McGuckin to foreclose a mortgage executed by the first-named defendant to the plaintiff. Anna McGuckin resisted the foreclosure, on the ground that at the time of the execution of the mortgage, and at all times subse-

³ For discussion of principles see Tiffany, Persons & Dom. Rel. (3d Ed.) § 5.

⁴ Part of the opinion is omitted.

quent thereto, she was the wife of her codefendant, and that the ~~mortgaged premises~~ was their family homestead; that the mortgage, not having been signed and acknowledged by her, was void. The reply was a general denial. A trial of the issues joined resulted in a finding and ~~decree~~ in favor of the defendant, to reverse which the case is brought to this court on appeal. For reasons not necessary to state in detail, the case is now prosecuted under its present title.

The ~~first~~ question presented is whether the findings of the trial court are sufficient to sustain the decree. The appellant challenges the sufficiency of the finding on two grounds, which will be considered in their order. It is first urged that the findings do not establish a marriage between Anna McGuckin and her co-defendant. The finding on this point is as follows:

"(4) The court further finds that the said Anna McGuckin entered the home of Daniel L. McGuckin in the month of April, 1880, as housekeeper for Daniel L. McGuckin. That she was then the wife of James Lavelle. That at the solicitation and expense of Daniel L. McGuckin she commenced an action for divorce against said James Lavelle in Burt county, Nebraska, and that a divorce was granted her on May 4, 1880, in the district court of Burt county, Nebraska. That at the time of the filing of her petition in Burt county, Nebraska, she was living in Burt county, Nebraska, and that her parents, with whom she had made her home since separating from said James Lavelle, were residing in said Burt county, Nebraska.

"(5) That in April, 1880, Daniel L. McGuckin was a married man, and that he obtained his divorce from his wife in August, 1880, and that said Anna McGuckin did not know of the fact that Daniel L. McGuckin was married until May 4, 1880. That at a time prior to the obtaining of her divorce, to wit, on May 4, 1880, said Daniel L. McGuckin and Anna McGuckin promised to marry as soon as she should get her divorce, and that they commenced cohabiting together at said time, and continued to so cohabit until April, 1893. That the said Daniel L. McGuckin again promised to marry the said Anna McGuckin after she got her divorce, and before he obtained his divorce, and promised that he would so marry her as soon as he could procure a divorce from his wife. That pending his action for divorce they cohabited as husband and wife, and held each other out to the world as husband and wife, and that no marriage ceremony was ever performed, and that she continued to live with and cohabit with the said Daniel L. McGuckin until the spring of 1893. That they announced themselves as husband and wife to her relatives, and so conducted themselves wherever they went. That he introduced her as his wife in society and in the church, and spoke of her as his wife in stores where they traded, addressed her as 'Mrs. McGuckin' in the pres-

ence of company, paid her bills, and supported her as his wife. That Daniel L. McGuckin gave her an engagement ring and a wedding ring. That she gave birth to five children, whose paternity Mr. McGuckin has always acknowledged, and which were duly baptized in the Catholic Church as children of legally married parents. Four of said children are still living. That the promises above made were the only promises ever made, and that no new promise was made after the obtaining of the divorce by Daniel L. McGuckin, nor was there any apparent change in their manner of living or holding themselves out as husband and wife."

In our opinion the foregoing is a finding of a marriage between the parties. Marriage in this state is purely a civil contract, and whenever the minds of parties capable of entering into a marriage contract with each other meet in a common consent thereto at the same time there is a valid marriage. *Bailey v. State*, 36 Neb. 808, 55 N. W. 241. No particular form of words is required to express such common consent. The announcement of the parties to her relatives that they (the defendants) were husband and wife in itself shows a meeting of their minds at the same time in common consent to bear that relation each to the other. That the relations between the parties, before divorced from their respective spouses, was meretricious, is immaterial, so long as their minds did meet, as before stated, at a time when they were both free to enter into a contract of marriage. *Poole v. People*, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245; *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800. * * *

PER CURIAM. For the reasons stated in the foregoing opinion, the decree of the district court is affirmed.

On Rehearing.

(Supreme Court of Nebraska, 1902. 64 Neb. 300, 89 N. W. 778. 57 L. R. A. 917.)

AMES, C. This cause is resubmitted upon arguments and briefs upon a rehearing granted from a former decision in the same cause, the opinion in which was filed on the 10th day of July, 1901. The case was submitted, upon a record containing the pleadings and findings of fact of the trial court, only. The principal question discussed upon the reargument, and the only one with which we think it requisite to deal in this opinion, is that of the validity of the alleged marriage between the appellees Anna McGuckin and Daniel McGuckin. The findings of fact relative to this inquiry are copied in the former opinion, and need not be repeated here. The district court found, as a conclusion of law, that they were sufficient to establish the validity of the marriage. In this conclusion this court, in its former opinion, concurred.

The facts found are many of them evidential, rather than ulti-

mate, in character. The beginning of the cohabitation was meretricious, each of the parties having a lawful spouse then living; but both these obstacles were soon afterwards removed by decrees of divorce, and thereafter the parties not only continued for a long term of years to live together as husband and wife, and to enjoy the repute of that relation, but continuously represented themselves to the public and individuals as being such. During this time, and before the making of the mortgage in question, five children were born of the union, whom their parents unitedly represented to the public, and caused to be baptized into church, as the children of lawful wedlock. That these facts and certain others recited in the finding would, if standing alone, be sufficient evidence of marriage, cannot be doubted, and is explicitly admitted by counsel for the appellant in both brief and argument. But in connection with them, and as a part of the same finding in which they are set forth, the court also found that, although the parties made promises to marry prior to the obtaining of the divorces, yet that such promises "were the only promises ever made, and that no new promise was made after obtaining of the decree of divorce by Daniel McGuckin, nor was there any apparent change in their manner of living, or holding themselves out as husband and wife."

Counsel thereupon insists that a lawful marriage could have had its inception only in a promise or agreement of marriage after the removal of the legal obstacles thereto; that the evidential facts found are of no significance, except as tending to establish the making of such a promise or agreement, or of raising a presumption that one had been made, and that whether one had been made was the only ultimate fact in controversy; and that the language quoted above from the finding, being an express negation of such promise, is decisive of the case, so that the evidential facts found are immaterial. In other words, it is contended, as we understand counsel, that a single finding by the court that there was no promise or agreement after obtaining of the divorces would have had the precise legal weight of the actual finding, and that it is not a material inquiry whether the court recited all or only part of the evidence establishing this ultimate fact, because it was not obligatory upon him to recite any of it. We can hardly believe that this is the interpretation which the trial judge himself put upon his findings, and we are not convinced that it is the true one to be given to that document. In our opinion, an express verbal promise or agreement of marriage is not in all cases indispensable under our law. The statute enacts (section 1, c. 52, Comp. St.), "In law, marriage is considered a civil contract to which the consent of the parties capable of contracting is essential."

The main purpose of this definition is, we think, to negative the idea that marriage is an ecclesiastical sacrament, or that in the eye of the law it is controlled by the mandates or dogmas, or subject to the observance of the rituals or regulations, of any particular churches or sects. That it is not a contract resembling in any but the slightest degree, except as to the element of consent, any other contract with which the courts have to deal, is apparent upon a moment's reflection. This was pointed out by the late Mr. Justice Field, with his usual clearness of expression and wealth of illustration, in *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654. What persons establish by entering into matrimony is not a contractual relation, but a social status; and the only essential features of the transactions are that the participants are of legal capacity to assume that status, and freely consent so to do. It may be true, as counsel for appellant contends, that the indispensable consent cannot be implied, but must in all cases be expressed; but it does not follow that it must be expressed in any especial manner, or by any prescribed form of words. The statute above cited dispenses with all ceremonials—verbal as well as other. It was probably this idea which was in the mind of the trial judge when he penned the words quoted above from his finding. In other words, it appeared to him, as it appears to us, that there was sufficient evidence that after the obtaining of the last divorce the parties consented to assume the status of husband and wife, although they made no explicit verbal contract or agreement so to do. Doubtless the very phrase which counsel for appellant regards as establishing the ultimate, conclusive, and solely essential fact, the trial judge looked upon as slightly, if at all, material. So construed, his finding is inconsistent neither with itself, nor with the conclusion of law and judgment, and that this is its true interpretation is to our minds perfectly clear.

As has already been said, it is conceded, and, indeed, it could not well be disputed, that there is in the finding, aside from this single expression, sufficient evidence of the consent of the parties, after the removal of their disabilities, to assume the marriage relation. That evidence is not rebutted by the mere negative fact that they omitted to express that consent by formal words. The ultimate fact is not that the parties made a formal promise or contract, but that they mutually consented to a social relation. This consent may be expressed by conduct as effectively as by words, and proof of the conduct is proof of the consent. In both cases the conclusion drawn by the court is from an implication, but in either case all that is required is that the expression be clear and unambiguous. In neither case can it properly be said that the contract or the consent is implied.

It is recommended that the former decision of this court be adhered to, and the judgment of the district court affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court be adhered to, and the judgment of the district court affirmed.

III. Reality of Consent⁵

1. FRAUD.

LYON v. LYON.

(Supreme Court of Illinois, 1907. 230 Ill. 366, 82 N. E. 850, 13 L. R. A. [N. S.] 996.)

Action by James A. Lyon against Susanne B. Lyon for the annulment of marriage, on the ground of fraud. The plaintiff alleged in his bill that the defendant for some years prior to the marriage had been subject to attacks of epilepsy; that to induce him to enter into the marriage she had falsely and fraudulently represented to him that she had been entirely cured of the disease and had had no attacks for eight years; that, relying on the truth of such representations, he married her on June 15, 1904, at Richford, N. Y.; that in April, 1905, he first learned of the falsity of the representations; and that in fact she had been subject to fits of epilepsy at frequent, but irregular, intervals for ten years immediately prior to the marriage. It was also alleged that the statutes of New York in force at the time of the marriage and now provide that in case the consent of one of the parties to a marriage is obtained by fraud such marriage may be annulled. On demurrer the bill was dismissed for want of equity. The decree was affirmed by the Appellate Court for the First District, and plaintiff appeals.⁶

DUNN, J. Appellant's claim is that the rights of the parties are to be determined by the law of New York, where the marriage was contracted, and that by such law this marriage was subject to be annulled for fraud. Fraud in the state of New York is not different, we presume, from fraud elsewhere. If the bill does not charge conduct which we would hold fraudulent, we cannot assume that the courts of another state would do so. The bill alleges that the

⁵ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 6-10.

⁶ The statement of facts is rewritten.

statutes of New York provide that the marriage may be annulled if .appellant's consent was obtained by fraud. Our inquiry is, therefore, whether the bill shows that appellant's consent was obtained by fraud, and the allegation will be construed according to the law of Illinois.

It is not alleged that any different definition of fraud has been established by statute or prevails in New York, or that the statute declares that a marriage may be annulled for a misrepresentation in regard to the health of one of the parties. The fraud charged is that the appellee falsely represented that she was entirely cured of her epilepsy and had no attack of it in eight years. So far as her being entirely cured was concerned, that was essentially a matter of judgment and opinion. The false representation of fact was that she had had no attack of the disease for eight years.

"As to fraud, in order to vitiate a marriage, it should go to the very essence of the contract. * * * Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament cannot, therefore, vitiate the contract. *Caveat emptor* is the harsh, but necessary, maxim of the law." Schouler on Domestic Relations, par. 23.

"In that contract of marriage which forms the gateway to the status of marriage, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or, indeed, generally, from fraudulent practices in respect to the character, fortune, health, does not render void what is done. To this conclusion the authorities all conduct us, but different modes of stating the reason for it have been adopted. Thus, the qualities just mentioned are said to be accidental, not going to the essentials of the relation; and Lord Stowell, after remarking that error about the family or fortune of an individual, though produced by disingenuous representations, does not affect the validity of the marriage, adds: 'A man who means to act upon such representations should verify them by his own inquiry. The law presumes that he used due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for relief of a blind credulity, however it may have been produced.'" 1 Bishop on Marriage and Divorce, par. 167.

"It is well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as to his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." 2 Kent's Commentaries, 77.

"The degree of fraud sufficient to vitiate an ordinary contract will not afford sufficient ground for the annulment of a marriage.

It is not sufficient that the party relied upon the false representations and was deceived, or that important and essential facts were concealed with intent to deceive. The marriage relation is a status controlled and regulated by considerations of public policy, which are paramount to the rights of the parties. * * * The fortune, character, and social standing of one of the parties are not essential elements of marriage, and it is contrary to public policy to annul marriages for fraud or misrepresentation as to such personal qualities." 19 Am. & Eng. Ency. of Law (2d Ed.) 1184.

Concealment of the fact that the woman had previously been insane has been held insufficient to justify a decree of nullity of marriage. Cummington v. Belchertown, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131. So has concealment of kleptomania. Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559. Also concealment by a woman of unchastity prior to marriage. Leavitt v. Leavitt, 13 Mich. 452; Allen's Appeal, 99 Pa. 196, 44 Am. Rep. 101; Varney v. Varney, 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726. Also concealment of a prior marriage. Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892; Fisk v. Fisk, 6 App. Div. 432, 39 N. Y. Supp. 537. Also concealment of the birth of an illegitimate child prior to marriage. Farr v. Farr, 2 MacArthur (D. C.) 35; Smith v. Smith, 8 Or. 100. The fraudulent representations for which a marriage may be annulled must be of something essential to the marriage relation—of something making impossible the performance of the duties and obligations of that relation, or rendering its assumption and continuance dangerous to health or life. Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833; Cummington v. Belchertown, *supra*.

The case of Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531, is not inconsistent with these rules, though it was there held that concealment of epilepsy was such a fraud as would justify a decree of divorce under the statute of that state forbidding marriage or sexual intercourse by or with an epileptic under penalty of imprisonment. The court said that a fraud was accomplished "whenever a person enters into that [marriage] contract knowing that he is incapable of sexual intercourse, and yet, in order to induce that marriage, designedly and deceitfully concealing that fact from the other party, who is ignorant of it and has no reason to suppose it to exist. Whether such incapacity proceeds from a physical or a merely legal cause is immaterial. The prohibition of the act of 1895 fastened upon the defendant an incapacity which, if unknown to the plaintiff and by him fraudulently concealed from her with the purpose thereby to induce a marriage, made his contract of marriage, in the eye of the law,

fraudulent. * * * The superior court has power to pass a decree of divorce from the bonds of matrimony in favor of a party to a marriage not an epileptic, who has been tricked into it by the other party, who was an epileptic, through his fraud in inducing a belief that he was legally and physically competent to enter into the marital relation and fulfill all its duties, when he knew that he was not."

The Supreme Court of New York, in *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609, held that the representation by a woman to a man that she had given birth to a child of which he was the father and which she purported to exhibit to him, when in fact she had not given birth to a child, was such fraud as to justify the annulling of a marriage brought about thereby. This representation is similar in kind to that of a pregnant woman, who induces a man with whom she has had illicit intercourse to marry her by the false representation that he is the father of her child. But such representation, under such circumstances, does not constitute fraud for which the marriage will be annulled, and we regard the decision in the *Di Lorenzo* Case as opposed to the weight of authority. *Franke v. Franke*, 96 Cal. xvii, 31 Pac. 571, 18 L. R. A. 375; *Foss v. Foss*, 12 Allen (Mass.) 26; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98.

The statute of New York mentioned in the bill merely declares the law as it exists in Illinois—that a marriage procured by fraud may be annulled. The kind and degree of evidence required for such purpose must be determined by the court in which the suit is brought, according to the law of the forum. The bill proceeds on the theory that the appellant's consent to the marriage was obtained by fraud, and sets out the facts constituting the fraud. Whether those facts constitute fraud must be determined by the law of the forum, and the superior court did not err in sustaining the demurrer to the bill. Its decree, and the judgment of the Appellate Court in affirmation thereof, will be affirmed.

Judgment affirmed.⁷

⁷ Compare *Gould v. Gould*, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531 (1905). See, also, *Lewis v. Lewis*, post, p. 17.

2. DURESS

SHORO v. SHORO.

(Supreme Court of Vermont, 1888. 60 Vt. 268, 14 Atl. 177, 6 Am. St. Rep. 118.)

Petition to annul a marriage contract under section 2349 of the Revised Laws. Trial by court at September term, Rutland county court, 1887, Rowell, J., presiding. Petition dismissed as a matter of law. Section 2349, Rev. Laws, is as follows: "The marriage contract may be annulled when * * * the consent of either party was obtained by force or fraud." The exceptions stated that "the petitioner had the alternative of going to jail or of marrying the petitionee." The other facts are sufficiently stated in the opinion.

Ross, J. This is a petition to have the marriage solemnized between the parties annulled, alleging, among other things that the petitioner's consent was obtained by force and fraud. It comes to this court on the facts found by the county court, and the exceptions of the petitioner to the refusal of the county court to annul the marriage. We have given the matter somewhat careful attention, both because the marriage contract is one in which the public generally is interested, and because no attorney has appeared for the petitionee.

The controlling facts found by the county court are that the petitioner, a lad 16 years old, never had sexual intercourse with the petitionee before or after the performance of the marriage ceremony, and never cohabited nor lived with her. She was older, of bad repute for chastity, and, without probable cause, maliciously caused him to be arrested upon bastardy proceedings. He was greatly frightened by the arrest, protested his innocence, but was told by the officer he must get bail or go to jail. He applied to his father to bail him, and was refused. The father told him to marry her or go to jail, and advised him to marry her, and not live with her. When protesting his innocence to the officer, the officer assured him that would not save him. He took his father's advice, went through the marriage ceremony performed by the magistrate who signed the warrant for his arrest, while under arrest, in the presence of the officer, and while greatly frightened, with the fixed intention of never living with her, which he has fully carried out.

Can there be a doubt that the marriage ceremony was procured by duress? What is duress? Says Mr. Bishop (1 Mar. & Div. § 210): "Where a consent in form is brought about by force, menace, or duress—a yielding of the lips, but not of the mind—it is of no legal effect." Bac. Abr. under the title "Duress": "If a

man takes A. S. to wife by duress, although the marriage be solemnized in *facie ecclesiae*, yet it is merely void, and they are not husband and wife, for without free consent there can be no marriage." Again he says: "It seems clearly agreed that where a person is illegally restrained of his liberty, by being confined in the common jail, or elsewhere, and during such restraint enters into a bond or other security, to the person who causes the restraint, he may avoid the same for duress or imprisonment." Mr. Bishop, in section 213, gives a case agreeing in its facts with the facts found by the county court in the case at bar, except the arrest was made without warrant, in which the marriage was annulled for duress. He intimates that, if the arrest was on a legal process, it would be otherwise. No doubt that would be true if by "legal process" he means is "issued for legal cause."

But, as to the petitioner, the process on which she caused his arrest was a pretense—a fiction—because procured maliciously, and without probable cause. If anything, it was worse than an arrest without process, but claiming to have one. Mr. Bishop (section 212) says: "A doubt may be entertained whether a process would not be void, if shown to be both malicious and without probable cause." But illegal pretense, as it was, so far as regards the petitioner, it accomplished her wicked and unlawful purpose—frightened the boy and caused him to consent to the performance of the marriage ceremony in form only—a yielding of his lips, but not of his mind.

Sartwell v. Horton, 28 Vt. 370, and Hoyt v. Dewey, 50 Vt. 465, are full authority that money procured by a threatened arrest, on a charge which the maker knows to be false and without foundation in fact, may be recovered back. In Sartwell v. Horton the case of Duke of Cadaval v. Collins, 4 Adol. & E. 858, is cited with approval. The case and decision is stated as follows: "That was an action to recover money paid to the defendant after the plaintiff had been served with process. The fact was found by the jury that the defendant knew that he had no claim upon the plaintiff when he sued out his writ. Coleridge, J., observed that 'no case has decided that when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law.' Patteson, J., observed that 'the jury concluded that the defendant knew that the debt did not exist, and that he used the process colorably. To say that money obtained by such extortion cannot be recovered back would be monstrous.'"

Much more monstrous, in our judgment, would it be to hold that a boy only 16 years old, whose verbal consent to a marriage ceremony had been extorted by the use of a process known to be without probable cause, and used maliciously, instigated and

set on foot by an unchaste, pregnant woman of mature age, cannot be relieved from the life-long bondage of such a wife. The judgment of the county court is reversed, and the pretended marriage annulled and vacated.

IV. Mental Capacity of the Parties—Insanity⁸

LEWIS v. LEWIS.

(Supreme Court of Minnesota, 1890. 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559.)

VANDERBURGH, J. The statute in relation to divorces (Gen. St. c. 62, § 2) provides that "when either of the parties * * * for want of age or understanding is incapable of assenting thereto, * * * the marriage shall be void from the time its nullity is declared by a court of competent authority." Certain limitations are imposed by sections 4 and 5, as follows: "Nor shall the marriage of any insane person be adjudged void after his restoration to reason, if it appears that the parties freely cohabited together as husband and wife after such insane person was restored to a sound mind. Section 5. No marriage shall be adjudged a nullity at the suit of the party capable of contracting, on the ground that the other party was * * * insane, if such * * * insanity was known to the party capable of contracting at the time of such marriage."

There are no other provisions on the subject of insanity, and no form of insanity or insane delusion is included in the list of causes for divorce; and insanity arising subsequent to the marriage affords no ground for divorce. The section first quoted is simply declaratory of the common law. There must have been, at the time of the marriage, such want of understanding as to render the party incapable of assenting to the contract of marriage.

The plaintiff applies for a decree of nullity on the ground of his wife's insanity at the time of his marriage, of which he claims to have then had no knowledge. The particular form of insanity alleged was a morbid propensity on the part of the wife to steal, commonly denominated "kleptomania." It was not proved, nor is it found by the court, that she was not otherwise sane, or that her mind was so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. Whether the subjection of the will to some vice or uncontrollable

⁸ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 12.

impulse, appetite, passion, or propensity be attributed to disease, and be considered a species of insanity or not, yet, as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the contract.

Any other rule would open the door to great abuses. Anon. 4 Pick. (Mass.) 32; St. George v. Biddeford, 76 Me. 593; Durham v. Durham, 10 Prob. Div. 80. For a discussion upon the characteristics of the peculiar infirmity to which the defendant here is alleged to be subject, see 1 Whart. & S. Med. Jur. (4th Ed.) §§ 591, 595. The cases are numerous in which contracts and wills have been upheld by the courts, though the party executing the same is subject to some peculiar form of insanity, so called, or is laboring under certain insane delusions. *In re Blakely's Will*, 48 Wis. 294, 4 N. W. 337; Jenkins v. Morris, 14 Ch. Div. 674; 11 Amer. & Eng. Enc. Law, 111, and cases.

2. The defendant is found to have been subject to this infirmity at the time of her marriage with plaintiff, in 1882, but it was concealed and kept secret from the plaintiff by her and her relatives, and was not discovered by him until 1888. As before suggested, if it had developed after the marriage, the plaintiff would not have been entitled to judicial relief, though the consequences might have been equally serious to him. But the plaintiff contends that such concealment constituted a case of fraud, such that the court should declare the contract of marriage void on that ground.

Where one is induced, by deception or stratagem, to marry a person who is under legal disability, physical or mental, the fraud is an additional reason why the unlawful contract should be annulled. And so deception as to the identity of a person, artful practices and devices, used to entrap young, inexperienced, or feeble-minded persons into the marriage contract, especially when employed or resorted to by those occupying confidential relations to them, and where the contract is not subsequently ratified, are proper cases for the consideration of the court. But, generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves, by acquaintance and satisfactory inquiry, before entering into a contract of the first importance to themselves and to society in general. *Reynolds v. Reynolds*, 3 Allen (Mass.) 607, 608; *Leavitt v. Leavitt*, 13 Mich. 456; 1 Cooley, Bl. 439, and notes.

The facts found do not present a case warranting the relief asked. Judgment affirmed.

V. Same—Nonage⁹

ELIOT v. ELIOT.

(Supreme Court of Wisconsin, 1890. 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.)

Action for annulment of marriage on the ground of the nonage of the plaintiff. The parties were married January 5, 1890. The plaintiff was 15 years old February 23, 1889, and was not yet 18 years old when the action was begun. A demurrer to the complaint being overruled, defendant appeals.

LYON, J.¹⁰ * * * * It is claimed that, if the parties voluntarily cohabited after the marriage, no action can be maintained under section 2350, Rev. St. 1878, for the annulment of the marriage, and that the amended complaint shows such cohabitation. Although the learned counsel for the respective parties agree that the complaint may be considered as containing an averment of voluntary cohabitation after marriage, the fact is there is no such averment therein. It is only stated that after the marriage the parties "had or attempted to have sexual intercourse." This falls far short of an averment that they had such intercourse. In determining the validity of a pleading we must take it as it is, notwithstanding counsel agree that, for the purposes of the argument and decision, it may be treated as something which it is not. Hence, we cannot regard the amended complaint as containing an allegation of such voluntary cohabitation. But if the construction of section 2350 for which counsel for defendant contends be adopted, we are willing to assume, for the purposes of this appeal, that the complaint should negative such cohabitation. This not being done, if defendant's construction of the statute prevails, the complaint would (on the above assumption) be equally as defective as though it expressly admitted such cohabitation.

This view renders a construction of the statute necessary. Section 2350 reads as follows: "When either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when the consent of either party shall have been obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void from such time as shall be fixed by the judgment of a court of competent authority declaring the nullity thereof." If

⁹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 13.

¹⁰ Part of the opinion is omitted and the statement of facts is rewritten.

the grammatical construction of the section alone be considered, it must be conceded, we think, that the qualifying words "and there shall have been no subsequent voluntary cohabitation of the parties" refer to and control actions for the annulment of marriages for incapacity to assent thereto for want of age or understanding as well as those to which assent has been obtained by force or fraud. But this is not conclusive. If there is anything in the statutes which evidences a contrary intention on the part of the legislature, such intention ought to prevail.

We are of the opinion that section 2353 contains a provision which manifests such contrary legislative intention. It reads thus: "No marriage shall be declared a nullity, on the ground that one of the parties was under the age of legal consent, if it shall appear that the parties, after they had attained such age, had, for any time, freely cohabited together as husband and wife." This provision is in pari materia with section 2350, and they must be construed together. If voluntary cohabitation before the age of consent defeats an action for the annulment of a marriage under section 2350, there is no necessity for the provision in section 2353 that such cohabitation after the age of consent is reached shall have that effect. In that case it would be entirely superfluous. But if the qualifying words in section 2350 be held to relate only to actions to annul marriages to which consent has been obtained by force or fraud, both sections are operative. We must assume the legislature intended that both should be operative, else both would not have been enacted. This is too plain an evidence of legislative intention to be disregarded.

The same construction was given to the above statutes by the justices of this court in circuit court rule 29, adopted in 1879. It contains the following provisions: "Where an action is brought to declare a marriage a nullity on the ground that the plaintiff was under the age of legal consent, the complaint must allege that the plaintiff has not yet attained such age, or that the parties have not voluntarily cohabited together as husband and wife after the plaintiff has attained the age of legal consent. If such action be brought on the ground the consent of the plaintiff was obtained by force or fraud, the complaint must allege that the parties have not voluntarily cohabited together since the discovery of the fraud."

For the reasons above suggested we must hold that voluntary cohabitation of the parties before the age of legal consent is reached does not defeat an action for the annulment of a marriage on the ground of want of age to assent thereto. The view we have taken of this branch of the case renders it unnecessary to determine here the meaning of the term "voluntary cohabitation" as the same is used in the statutes above cited, which was discussed by counsel in argument.

Section 2329, Rev. St., provides that "every male person who shall have attained the full age of eighteen years, and every female who shall have attained the full age of fifteen years, shall be capable in law of contracting marriage, if otherwise competent." We have no statute which expressly provides that persons under the ages respectively named shall be incapable of contracting marriage. Because of the omission of such prohibition in the statute, counsel for defendant has submitted an argument in support of the proposition that valid and binding marriages may still be contracted by persons who have reached the common-law ages of consent, (which is understood to be 14 years for males and 12 years for females,) although they have not reached the respective ages specified in the statute.

The argument is ingenious, and the position is not unsupported by authority; but we think the weight of authority, as well as the better reason, is against it. *People v. Slack*, 15 Mich. 193, holds that the common-law rule as to the ages of consent is abrogated by a statute like our section 2329. Judge Cooley delivered the opinion of the court, and the case is an instructive one. Other cases to the same effect are cited in the brief of counsel for plaintiff.

Lastly, counsel for defendant maintains that if the right to an annulment of this marriage for want of age exists, the plaintiff cannot be heard to assert such right until he reaches the statutory age of consent, to wit, 18 years. Some such rule may have prevailed in early times, but the later authorities seem to reject it, we think for sufficient reasons. *Tyler*, in his treatise on Infancy and Coverture, says: "The better opinion now is that parties marrying before the age of consent may dissent to the marriage within nonage, and thus avoid it in *toto*." Page 126. This marriage is not an absolute nullity. It is only annulled from such time as shall be fixed by the judgment of the court. Section 2350. That time may, and in many contingencies should, be fixed at a later date than that of the marriage. During the time intervening the marriage is valid. It is, so to speak, a marriage on condition subsequent, the condition being its disaffirmance by a party thereto, and annulment thereof by the court, from the time named.

If the plaintiff had capacity to become a party to such imperfect and inchoate or conditional marriage, he should have capacity to disaffirm it any time thereafter, before it has ripened into an absolute marriage, by invoking the authority of the court to annul it under the statute. No good reason is perceived why the parties should be compelled to remain in so unfortunate a position until the plaintiff becomes 18 years of age. Again, rule 29, above cited, recognizes the plaintiff's capacity to maintain the action before he reaches that age, by prescribing what the complaint shall contain, if the action is thus brought. We must hold, there-

fore, that the plaintiff may maintain this action, although he has not reached the age of legal consent.

Upon the whole case our conclusion is that the court properly overruled the demurrer to the complaint. * * * Order affirmed.

STATE ex rel. SCOTT v. LOWELL.

(Supreme Court of Minnesota, 1899. 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358.)

START, C. J. On October 18, 1899, the relator, Alexander W. Scott, a man 32 years of age, and Sadie Lowell, a girl then only 13 years and 11 months old, the daughter of the respondent Fred L. Lowell, were married, without the consent of her parents, in due form, by an ordained minister of the gospel, upon the presentation of a license in due form, issued by the clerk of the proper county. Cohabitation as husband and wife followed the marriage, but on the next day thereafter the father went to the house of the husband, and forcibly took his daughter away, against her will and wishes, and detained her.

Thereupon a writ of habeas corpus in her behalf was sued out of the district court for the county of Hennepin, on the relation of her husband. Upon a hearing on the return of the writ the court discharged the writ, and remanded the wife to the custody and control of her father, from which order the relator appealed to this court. The cause was here heard de novo, pursuant to Laws 1895, c. 327. A referee was appointed to take and report the evidence, who did so. The evidence establishes the facts we have already stated, and, further, that the husband is an industrious man, who has a home, and is able to support a wife and family, and that his wife is ready and anxious to return to and live with him as her husband, if relieved from the restraint of her father.

The wisdom of this marriage, or the propriety of the relator's conduct in inducing this young girl to marry him, are questions which it is not our province to discuss or characterize. Moralize as we may, the fact remains that the parties were married, and the marriage has been consummated; hence we are now simply to inquire dispassionately as to the legal status of the parties. The question presented by the record is, was this marriage void or voidable, and, if the latter, did it emancipate the wife from the custody of her father?

The common law established the age of consent to the marriage contract at 14 years for males and 12 years for females, but our statute (Gen. St. 1894, § 4769) provides "that every male person who has attained the full age of eighteen years and every

female who has attained the full age of fifteen years, is capable in law of contracting marriage if otherwise competent." But the statute does not declare that, if a marriage is entered into when one or both of the parties are under the age limit prescribed, the marriage shall be void. It does, however, impose restrictions and penalties upon public officers and clergymen, for the purpose of preventing, so far as possible, such marriages being solemnized; but the statute has, for wise reasons, stopped short of declaring such marriages void.

Such being the case, we hold, upon principle and authority, that the marriage of a person who has not reached the age of competency as established by the statute, but is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of legal consent, to be exercised at any time before reaching such age, or afterwards if the parties have not voluntarily cohabited as husband and wife after reaching the age of consent. Gen. St. 1894, §§ 4769, 4786, 4788, 4789; Schouler, Dom. Rel. § 20; 14 Am. & Eng. Enc. Law, 488; 1 Bish. Mar. & Div. § 145; Beggs v. State, 55 Ala. 108; Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; State v. Cone, 86 Wis. 498, 57 N. W. 50. The marriage being voidable, it must be treated as valid for all civil purposes until annulled by judicial decree. Schouler, Dom. Rel. § 14.

Now, the question of the right of the respondent, as father of the relator's wife, to restrain her from going to her husband, must be determined upon the basis that the marriage is valid. The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent; for the marriage creates relations inconsistent with subjection to the control of the parent. Parental rights must yield to the necessities of the new status of the child. 1 Bish. Mar. & Div. § 275; Schouler, Dom. Rel. § 267. The correctness of this proposition as a general rule is admitted, but it is claimed on behalf of the father that it does not apply to this case, because the husband cannot enforce his marital rights without the consent of the wife, and that she cannot, by giving her consent to a voidable marriage, free herself from parental control, and, further, that she cannot do so until she reaches the age when she can legally affirm the marriage; that to hold otherwise would enable a girl under 12 and over 7 years of age to emancipate herself by consenting to a voidable marriage.

This course of reasoning ignores the fact that the marriage, until set aside, must be, for all civil purposes, treated as valid, and that it is her new and inconsistent status as a wife which emancipates her from the control of her father. A wife—and this girl must be regarded as such for the purposes of this case—certainly has the capacity to consent to live with her husband. Whether the marriage of a child under 12 years of age and over 7 would em-

anticipate her, we need not determine. It would seem, however, that the operation of natural laws would incapacitate her in fact from assuming the new and inconsistent relations which emancipate a minor from parental control.

Our conclusion is that the respondent is not legally entitled to detain his daughter, if she elects to return and live with her husband. Therefore it is ordered that Sadie Scott, the wife of the relator, Alex. W. Scott, be freed from the restraint of her father, the respondent Fred L. Lowell, and that he surrender her to the relator, if she elects to live with him as her husband. Let judgment be so entered.

VI. Capacity of Parties Otherwise Than Mentally— Prior Marriage¹¹

DRUMMOND v. IRISH.

(Supreme Court of Iowa, 1879. 52 Iowa, 41, 2 N. W. 622.)

Action by Rebecca Drummond to recover certain personal property of the estate of John Drummond, deceased, set off to plaintiff as the widow of said Drummond. The defendant, James D. Irish, administrator of the estate, alleged that plaintiff was not the lawful wife of said Drummond, that at the time of her marriage to Drummond she had a husband living from whom she had not been divorced. On the trial it was found that the marriage of plaintiff and deceased was a valid marriage and the property in question was awarded to plaintiff as widow of deceased. Defendant appeals.

ROTHROCK, J.¹² It appears from the evidence, and an agreement made by the parties, that plaintiff was married in due form to one W. P. Eaton, prior to her marriage with John Drummond, and that at the time of her marriage with Drummond Eaton was still living, and that he and the plaintiff had not been divorced, nor the bonds of matrimony existing between them severed by any judicial or other legal proceeding, and said Eaton is still living, and still undivorced from plaintiff. It further appears that at the time of the marriage of plaintiff with said Eaton he had a wife living, from whom he had not been divorced, and that said wife is still living, and not divorced from him, and that plaintiff never lived with said Eaton after she was married to him.

¹¹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 18.

¹² Part of the opinion is omitted and the statement of facts is rewritten.

Section 2201 of the Code provides that "marriages between persons where marriage is prohibited by law, or who have a husband or wife living, are void. * * *" The marriage of the plaintiff with Eaton was therefore void, and neither of them acquired any rights thereby, and the plaintiff lost no right. Being void it was the same as though no marriage had ever taken place. The marriage with Drummond was therefore valid, and the court properly held that plaintiff was entitled to the property as widow. See Carpenter v. Smith, 24 Iowa, 200; 2 Bouvier's Law Dict. 246.

It is contended by counsel for defendant "that the first and illegal marriage must be judicially annulled before civil rights can be acquired or civil remedies demanded by reason of a subsequent legal marriage." This position would doubtless be correct if the marriage were merely voidable, but it can have no application to that which the law declares to be a void marriage. The fact that the Code contains provisions for annulling marriages of this character, and judicially determining the status of the parties, cannot be regarded as changing the rule which has always obtained that a void marriage is no marriage. * * * Judgment affirmed.¹³

VII. Formalities in Celebration—Informal Marriages¹⁴

RENFROW v. RENFROW.

(Supreme Court of Kansas, 1899. 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350.)

DOSTER, C. J. Grant and Ann Renfrow were colored persons living in the state of Missouri. They married each other in 1852 according to the ordinary form of marriage agreement and ceremony. This marriage did not confer upon them any legalized matrimonial status or relation. It was not deemed illegal or immoral by the law then obtaining, but it did not constitute them husband and wife. "It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage." Hall v. U. S., 92 U. S. 27, 23 L. Ed. 597. "Marriage is based upon contract; consequently the relation of husband and wife cannot exist among slaves. It is excluded both on account of their incapacity to contract, and of the paramount right of ownership in them as property." Howard v. Howard, 51 N. C. 235. To the same effect is Johnson v. Johnson, 45 Mo. 595.

¹³ See, also, Gall v. Gall, post, p. 28.

¹⁴ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 19-21.

As presently more particularly stated, the persons named lived together as husband and wife until 1868. Missouri was not within the insurrectionary portions of slaveholding territory, over which the emancipation proclamations of September 22, 1862, and January 1, 1863, operated. Slavery continued to exist there until abolished, January 11, 1865, by ordinance of the constitutional convention of that state. Gen. St. Mo. p. 46. After the passage of this ordinance, and on February 20, 1865, the legislature of Missouri enacted the following statute: "That in all cases where persons of color heretofore held as slaves in the state of Missouri have cohabited together as husband and wife, it shall be the duty of persons thus cohabiting to appear before a justice of the peace of the township where they reside, or before any other officer authorized to perform the ceremony of marriage, and it shall be the duty of such officer to join in marriage the persons thus applying, and to keep a record of the same. Free persons of color living or cohabiting together as husband and wife without being married according to the provisions of this act, shall, after twelve months from its passage, be liable to criminal prosecution, and subject to same penalties as now provided by law. Provided, however, that this section shall not extend to colored persons, who have enlisted in the service of the United States or state of Missouri, who shall not be subjected to any penalty for its violation until six months after their discharge from said service."

The Renfrows never complied with the provisions of this law. In disregard of it, they continued to live together until 1868, in which year Grant abandoned Ann, declaring his intention to no longer recognize her as his wife. Thenceforth he never did recognize her as such, but several times thereafter married other women, by some of whom he had children. Throughout the time intervening between his emancipation from slavery and his separation from Ann, they lived together in Missouri as husband and wife, mutually recognizing and holding each other out in the face of the world as such. Grant Renfrow moved to Kansas, and accumulated here a small amount of property. He died. This action was instituted by his first wife, Ann, in assertion of her rights, as his widow, to a division of the property left by him. To this action his children and his last wife, Medora, were made defendants. Upon the facts above summarized, judgment was rendered against them, and they prosecute error to this court.

It is admitted by counsel for plaintiffs in error that consensual or common-law marriages are, and at the dates above mentioned were, recognized as valid in the state of Missouri. It is, however, insisted that the above-quoted Missouri statute disqualified persons of color from contracting marriage according to the common law. It is insisted that the penal provisions of this statute excluded such class of persons from the operation of the common law of

consensual marriage, and rendered ineffectual and void all agreements of marriage by such persons which were not solemnized according to its provisions.

The plaintiffs in error are mistaken. The statute in question does not pretend to operate upon the marriage status. It does not pretend to annul or forbid the marriage relation because not entered into in accordance with prescribed forms. It only provides penalties for noncompliance with certain ceremonies of solemnization. It is, in effect, like the statute of this state discussed in *State v. Walker*, 36 Kan. 297, 32 Pac. 279, 59 Am. Rep. 556, in which it was held that "punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirements, without rendering the marriage itself void."

The general doctrine is that a marriage good at common law is good notwithstanding the neglect of statutory forms relating to the subject, unless the statute itself contains express words of nullity because of the failure to conform to its requirements. 1 Bish. Mar. & Div. (5th Ed.) § 283; *Meister v. Moore*, 96 U. S. 76, 24 L. Ed. 826. The statute, it will be observed, makes it the "duty" of colored persons to solemnize their marriage agreement before an officer, but it does not abrogate the marital relation as a penalty for the violation of its provisions.

It is also insisted that the facts stated do not show the existence of a consensual or common-law marriage between Grant and Ann Renfrow, because no express agreement between them to take and live with each other as husband and wife was shown to have been made at any time intermediate their emancipation from slavery and their separation three years later, without which agreement, it is contended, such kind of marriage cannot exist, or, to state the contention of the plaintiffs in error more accurately, cannot be proved. It is true, the making of such agreement was not shown, but it does not follow that legal proof of the marriage was lacking. If a marriage contract need not be evidenced by writing—and, of course, it need not be—we can conceive of no reason why it may not, like many other civil contracts, be evidenced by acts and conduct from which its making ore tenus may be presumed. The acts and conduct of Grant and Ann Renfrow after the removal of their disabilities were in recognition of each other as husband and wife; were continued for a sufficient length of time, and with such openness to the world, as to estop each other from claiming to the contrary, and to establish for themselves the marital status in the community where they resided.

In the case of *Francis v. Francis*, 31 Grat. (Va.) 283, the same contention was made before the court of appeals of Virginia, in the case of a colored man and woman, as the plaintiffs in error make before us in this case. In the opinion of the court in that case

it was said: "It must appear that they have agreed to occupy that relation. The fact that they have agreed to do so is, however, not always susceptible to direct proof. The courts must in many cases infer it from circumstances. It is not necessary that the parties shall have expressly agreed to live together as husband and wife. The agreement or understanding may be implied, as in other cases, from their conduct and declarations. In the present case there is no positive proof of an express agreement of the appellant and the appellee to occupy the relation to each other of husband and wife. But the circumstances tending to show an implied understanding of that sort are almost as satisfactory as the direct testimony of unimpeached witnesses to the fact."

The facts involved in *McReynolds v. State*, 5 Cold. (Tenn.) 18, were identical with those now under consideration; and in that case the court held that, after the living together of a slave man and woman as husband and wife, a mutual recognition by them of each other in that relation, after the removal of their disabilities by emancipation, constituted a consensual marriage. * * *

Judgment affirmed.

GALL v. GALL.

(Court of Appeals of New York, 1889. 114 N. Y. 109, 21 N. E. 106.)

Action by Amelia Gall against Charles F. Gall for the admeasurement of dower in the lands of Joseph Gall, deceased, of whom plaintiff claimed to be the wife. Judgment for plaintiff, which was affirmed by the general term on appeal, and defendants again appeal.

VANN, J.¹⁵ By this action the plaintiff, alleging that she was the lawful wife of one Joseph Gall, deceased, sought to recover dower in the lands of which he died seised. As she made no effort to prove ceremonial marriage between herself and Mr. Gall, the decision of the issue turned primarily upon the inference to be drawn from certain acts and declarations of the parties, and their marital reputation among their acquaintances.

The competency of the plaintiff to contract marriage with Mr. Gall was questioned, upon the ground that she had been previously married to one John Jermann, who was still living, undivorced, at the time of the trial. It was conceded that she had no right to marry Mr. Gall, provided her marriage to Mr. Jermann was valid. This depended upon the competency of Jermann to marry, as he had a living wife, Helena, from whom he had not been divorced at the time he married the plaintiff. The competency of Jermann to marry the plaintiff rested upon that provision of the Revised Statutes which permits a man, already married, to marry again,

¹⁵ Part of the opinion is omitted.

provided his former wife shall have absented herself for the space of five successive years without being known to him to be living during that period. 3 Rev. St. (7th Ed.) p. 2332, § 6.

Thus upon the trial there arose three questions of fact, which were submitted to a jury for decision, in the following form: (1) Did Helena Jermann, the first wife of John Jermann, absent herself for the space of five years prior to the marriage of Jermann to the plaintiff, within the meaning of the statute upon that subject? (2) Was said Helena Jermann known to John Jermann to be living during the period of five years immediately preceding his marriage to the plaintiff? (3) Did the plaintiff and Joseph Gall, deceased, at any time between the month of February, 1883, and the decease of said Gall, intermarry? The jury, after answering the first question in the negative, and the second and third in the affirmative, found a general verdict for the plaintiff.

The first question presented for decision is whether, within the rules governing appeals to this court, there was sufficient evidence to support the findings of the jury. The determination of this question requires a somewhat extended examination of the facts, as the jury may be presumed to have found them. Joseph Gall died May 22, 1886, in the eighty-second year of his age. He married in early life, and his wife, after living with him for many years, died on the 23d of February, 1883, leaving no children. The plaintiff, under the name of Amelia Stieb, was employed in the family as an ordinary servant from 1877 until the death of Mrs. Gall, and after that event she continued to serve Mr. Gall for a time in the same capacity, at his residence, No. 4 Rutherford place, in the city of New York. During this period the outward relations, at least, between Mr. Gall and the plaintiff were simply those of master and servant. She cooked his meals and kept his house, but did not sit at his table nor apparently have any unusual privilege.

During the spring or summer of 1883, however, a criminal intimacy sprang up between them; and in the fall, believing that she was pregnant by him, he requested his physician to make a physical examination, which resulted in the discovery that she was with child. He thereupon gave up his establishment at No. 4 Rutherford place, and took rooms at the Westminster Hotel, while she removed to a tenement house, where he supported her, and furnished her with a servant. In February, 1884, the plaintiff was delivered of a daughter, of whom he acknowledged in many ways that he was the father. In May, 1884, he moved her to a house in Brooklyn, recently purchased by him for the purpose, where she lived with her mother, brother, and sister, all supported by him. He stated at the time, to one person, that he bought this house for his wife and child, and to another that he bought it for his family. Previously he had called plaintiff's mother "Mrs.

Stieb," but after this he habitually called her "mother," and once told her that the plaintiff was his wife.

In May, 1884, he went to Europe, returning in July, when he resumed his rooms at the Westminster, and thereafter, until March, 1886, he visited the plaintiff at the house in Brooklyn from one to three times a week, generally remaining over night, and usually from Saturday evening until Monday morning. They occupied the same bed, ate at the same table, and all of their apparent relations were those of husband and wife. From the time the plaintiff began to live in the Brooklyn house until the date of his death he treated her in that locality as his wife, and she was reputed in that neighborhood to be his wife. He introduced her as such to the neighbors; spoke to her and of her to servants, and others having business in the house, as his wife; referred mechanics to "Mrs. Gall" for further particulars in making repairs that he had ordered; directed plumbers to do whatever his wife ordered, and said that he would pay for it; and said to plaintiff's sister and her husband, as he gave them a present on their wedding anniversary, "this is a small present from myself and wife." On one occasion Mr. Gall, the plaintiff, and the child were at Rockaway Beach, and, as "he was dancing around with the child, * * * the people were making remarks about it, and asked him whether that was his child," when he answered: "Yes; that is my child, and there is my wife."

A few months before his death he said to his partner in business that he was not going to Europe that year, because he expected an increase in the family, and, on being asked if he was actually married to the plaintiff, said that he had taken legal advice on the matter, and that according to the laws of the state of New York he was married to her. When urged on the same occasion to have a ceremony performed for the sake of the children, "one living and one coming," he said that he did not care to make his private affairs public. In March or April, 1886, he left his rooms at the hotel, and moved his furniture to the house in Brooklyn, stating that he went there to reside permanently, and thenceforward he did reside there, until his death.

It was conceded that while Mr. Gall was at the Westminster Hotel he lived by himself, without any relations to the plaintiff or her family, so far as his life there was concerned. His old acquaintances, many of them persons of position, supposed that he was a widower. Aside from his business partner, he does not appear to have told any of them that the plaintiff was his wife. Only one other of his old friends, however, seems to have known that he cohabited with her, and he said nothing to him upon the subject, although he was the physician employed by Mr. Gall to attend the plaintiff upon the birth of the child. To a few of his old acquaintances, who did not know of his intimacy with her, or

that he had had a child by her, he spoke of the plaintiff as his cook or his housekeeper. He did not take her to see his relatives or old friends, or to the places which he frequented. On one occasion, when joked about getting married again, he said that he would not marry the best woman who ever trod in shoe-leather, and on another that he would not marry the best girl that ever lived. To one person he said that he was a married man, but his wife was dead; and to another, about six weeks before his death, that he should never marry again. He made other declarations of like character, but none of the persons to whom these statements were made appear to have known of the plaintiff's existence.

Prior to leaving Rutherford place, on the first of January, 1884, the plaintiff disclaimed being Mrs. Gall. She did not attend the funeral of Mr. Gall, but she was advised not to on account of her condition, being that of advanced pregnancy. * * *

In August, 1871, the plaintiff was married to John Jermann, knowing that he had been married before, but believing that he was divorced. She lived with him until 1875, when, learning that he had not been divorced, she left him. Jermann was married to Helena Pfeiffer on October 28, 1865. He lived with her about two weeks, when she left him. Six months later he found her in a house of assignation, and shortly afterwards, they met at the office of a lawyer, who prepared articles of separation, which they signed in the presence of witnesses, and each took a copy. He never saw her again, but believed that the articles of separation were a divorce. In 1870 he heard that she was dead. In fact she was living as late as 1873, two years after his marriage to the plaintiff, and was seen during that year in Indianapolis and New York. * * * Jermann never inquired to find out where she was, except on one occasion, when he asked an acquaintance, who said that he did not know anything about it. He continued to live in the same neighborhood as when he married Helena, and knew her brothers and sisters, her aunt and cousin, and others of her relations, and where some of them lived. He heard once that her family had moved west, but made no effort to find out about them or about her. He told the plaintiff both before and after he married her, that Helena was living, but that he had a divorce from her. * * *

Did these facts authorize the jury to draw the final inferences necessary to uphold their verdict? The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married. While such cohabitation does not constitute marriage, it tends to prove that a marriage contract has been entered into by the parties. Where, however, the cohabitation is illicit in its origin, the presumption is that it so continues until a change in its character is shown by acts and circumstances strongly indicating

that the connection has become matrimonial. It is sufficient if the acts and declarations of the parties, their reputation as married people, and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife. *Caujolle v. Ferrié*, 23 N. Y. 90; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Badger v. Badger*, 88 N. Y. 546, 554, 42 Am. Rep. 263; *Hynes v. McDermott*, 91 N. Y. 451, 457, 43 Am. Rep. 677.

A present agreement between competent parties to take each other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses. *Clayton v. Wardell*, 4 N. Y. 230; *Caujolle v. Ferrié*, *supra*; *Brinkley v. Brinkley*, 50 N. Y. 184, 197, 10 Am. Rep. 460. Such a marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors and relations, and the like. And where the intercourse was illicit at first, but was not then accompanied by any of the evidences of marriage, and subsequently it assumes a matrimonial character, and is surrounded by the evidences of a valid marriage above named, a question of fact arises for the determination of the jury. They are to weigh the presumption arising from the meretricious character of the connection in its origin with the presumption arising from the subsequent acknowledgment, declarations, repute, etc., and decide whether all of the circumstances, taken together, are sufficient evidence of marriage.

The application of these principles to the facts of this case leaves no doubt that the jury was warranted in finding that the plaintiff and Mr. Gall were married. The only evidence of the time when their intercourse began is the pregnancy of the plaintiff, discovered in August or September, 1883. They were not then living together as husband and wife, but as master and servant. She did not sit at his table, nor, so far as was known, sleep in his bed. They had not held themselves out as married, nor made any acknowledgment or declaration upon the subject. Neither their conduct nor reputation in any way indicated a married relation. The connection was purely licentious, and its only effect was to destroy the presumption of innocence when they began to openly cohabit. Contrast this state of affairs with that which existed just before the death of Mr. Gall. They were then openly living together as husband and wife, and were recognized as such by the mother, brother, and sisters of the plaintiff, by the physician, the neighbors, and by all who had either social or business relations with them. A child had been born to them, who bore his name, at whose baptism he was present, and whom in every way he acknowledged as his daughter. Neither of them had any home other than that where they openly lived together, with their

child, as a family. He called her his wife in the presence of others, said she was his wife in her absence, and told his old partner in business that according to law they were married. He volunteered to acknowledge both wife and child when there was no occasion to say anything to save appearances.

All of the circumstances surrounding them tended to show that they were married. One fact, which affected him only, and hence was immaterial, was inconsistent with the presumption of marriage. He passed as unmarried with his old friends and acquaintances, possibly because he did not wish them to know that he had married his cook. But it was held in *Badger v. Badger*, *supra*, that evidence of divided repute must be confined to those who have knowledge of the cohabitation, and that proof that a man was reputed to be unmarried, given by his friends who knew nothing of the putative wife, or of the fact of cohabitation, was mere hearsay. The reputation of Mr. Gall at the Westminster Hotel, therefore, did not tend to explain the character of his cohabitation with the plaintiff.

The competency of the plaintiff to marry Mr. Gall is an important question, depending upon the competency of Jermann, her first husband, to marry her, as he had a living wife. The statute covering the subject is as follows, viz.: "If any person whose husband or wife shall have absented himself or herself, for the space of five successive years, without being known to such person to be living during that time, shall marry during the life-time of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority." 3 Rev. St. (7th Ed.) p. 2332, § 6. Assuming that the declaration of Jermann that his first wife was alive was incompetent evidence to establish the fact that she was not known to him to be living during the statutory period, still, as no objection was made, it was not error to receive it.

The defendants, however, insist that there was no other evidence upon the subject, and that a verdict resting only upon incompetent evidence, even if received without objection, should not stand. But, as Jermann's first wife was in fact alive at the time that he married the plaintiff, the question of fact still remained whether he acted in good faith in contracting a second marriage. The section quoted seems to be based upon the probability that the absentee is dead, and is apparently designed to protect the person who, in good faith, acts upon the statute, from evil results, if the absentee is in fact alive. The first marriage is suspended, or, as was held in *Griffin v. Banks*, 24 How. Prac. 213, it is "placed in abeyance," but it is not reinstated by the return of the absentee, because the second marriage becomes void only from the time that it is so declared by a competent court. Otherwise both mar-

riages would be in force at the same time, and to this extent polygamy would be sanctioned by law. The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void. 3 Rev. St. (6th Ed.) p. 142, §§ 36, 37; Code Civil Proc. § 1745.

A statute with such possibilities should be so construed as to promote good order, and the person availing himself of its privilege should be required to act in perfect good faith. Jones v. Zoller, 32 Hun, 280, 282; Cropsey v. McKinney, 30 Barb. 47; McCartee v. Camel, 1 Barb. Ch. 455, 464. He decides the question as to his right to remarry for himself, without application to any court or public authority. The whole responsibility rests upon him. He cannot shut his eyes and ears, and justify a second marriage, because for five years he did not hear of his wife. Did he try to hear of her? Did he honestly believe she was dead? Did he make inquiry? Were the circumstances such that a reasonable man, honestly desiring to learn the truth, would have made inquiry? Was he excused from inquiring by a false report of her death?

Questions of this character are involved in the ultimate question of good faith, which is necessarily for the jury, as it depends upon the inferences to be drawn from a great many circumstances. In this case it was their duty to determine whether Jermann, in deciding that he had the right, relying upon the statute, to marry again, acted as a reasonable man, desiring to act in good faith, would have acted under the same circumstances. Whether he relied upon his supposed divorce, or upon the report that his wife was dead, instead of upon the statute, was for the jury to say. They were also to consider his opportunity for making inquiries, and the effect of his omission to do so. The facts warranted their conclusion that he did not act in good faith, and hence that his marriage to the plaintiff was void. * * *

The judgment should be affirmed.¹⁶

¹⁶ See, also, *In re Fitzgibbons' Estate*, 162 Mich. 416, 127 N. W. 313 (1910).

VIII. Conflict of Laws¹⁷

Ex parte CHACE.

(Supreme Court of Rhode Island, 1904. 26 R. I. 351, 58 Atl. 978, 69 L. R. A. 493.)

TILLINGHAST, J.¹⁸ This is a petition for a writ of habeas corpus, brought by Elizabeth E. Chace in behalf of her husband, Henry C. Chace. The material facts in the case are these: On the 23d day of May, 1899, Andrew D. Wilson was appointed guardian of the person and estate of said Henry C. Chace, a person of full age, under the provisions of Gen. Laws 1896, c. 196, § 7, on the ground that, from want of discretion in managing his estate, he was likely to bring himself to want. Subsequently, on the 20th of November, 1902, Mr. Chace married his present wife. The marriage was solemnized in Massachusetts, although both of the parties were domiciled in Rhode Island, and it was entered into by Mr. Chace without obtaining the written consent of his guardian, which is made one of the requisites for obtaining a marriage license in this state, under Pub. Laws 1898-99, p. 49, c. 549, § 11. Soon after the marriage, Mr. and Mrs. Chace returned to this state, and lived together as husband and wife for some months, until some time last August, when the guardian aforesaid removed Mr. Chace from his home, against his protest and that of the petitioner. The petitioner avers that the respondent guardian thereupon imprisoned Mr. Chace, and is now unlawfully restraining him of his liberty at No. 9 Lemon street, Providence; that he is deprived of the companionship, assistance, and care of his wife, which he desires; that he is not permitted to have social intercourse with her, save in the presence of his guardian; and that he is being treated in a manner inconsistent with the relation of guardian and ward.

In determining whether the petitioner is entitled to the relief she prays for, the first question calling for decision is whether she was lawfully married to Mr. Chace, for, if not, she shows no standing to petition in his behalf as his wife. It is argued by the counsel for the guardian that the marriage is invalid, and that the petitioner never became the wife of Mr. Chace. The reasons advanced are (1) that by our statute, cited above, a ward is rendered unable to obtain a marriage license without the consent of his guardian, and that no such consent was given by the respondent;

¹⁷ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 30.

¹⁸ Part of the opinion is omitted.

(2) that by the provisions of Gen. Laws 1896, c. 196, § 16, "all contracts, bargains, and conveyances made by any person under guardianship shall be utterly void"; (3) that these provisions show that it is the policy of our law to deny any validity to any kind of a contract which a ward attempts to make, and that therefore, although the marriage took place in Massachusetts, and may have fulfilled the requirements of Massachusetts law, it will not be recognized in this state.

We do not think that any of these arguments are sound. As to the first two, we think it is clear that the statutes relied upon can have no direct application to this marriage, for it was celebrated in another state, and under the provisions of other laws.

The third argument, however, requires more consideration. It is said by counsel for the guardian that "marriage, in evasion of the laws of the domicile, and contrary to the public policy or laws of the domicile, will not be recognized as valid." But it must be noticed, in the first place, that it nowhere appears, either in the pleadings or proof, that the marriage involved here was entered into in evasion of the laws of the domicile, and contrary to the public policy thereof. For aught that appears, the parties may have entered into this contract of marriage in the most perfect good faith, and without any intention of evading the laws of Rhode Island. And as is said by Mr. Bishop in the first volume of his work on Marriage, Divorce & Separation, §§ 77, 836: "Each particular instance of what is meant for marriage has the aid of all the presumptions, both of law and fact, and equally whether the marriage was domestic or foreign."

Furthermore, it is not clear that, even if the marriage had been solemnized in this state, it would have been void. Pub. Laws 1898-99, p. 49, c. 549, § 11, merely provides that no marriage license shall issue to a person under guardianship without the written consent of the guardian; but it by no means necessarily follows that a marriage procured without first obtaining such license would be void, although the official or other person who performed the ceremony might be liable to punishment under section 19 of the same chapter. See Parton v. Hervey, 1 Gray (Mass.) 119, 121. For while our statutes prescribe certain formalities and requirements in connection with the entering into the marriage relation, it is to be carefully borne in mind that they nowhere declare that the failure to observe any or all of said formalities or requirements shall have the effect to render a marriage void.

Again, although Gen. Laws 1896, c. 196, § 16, provides that all contracts made by a ward shall be void, it is at least very questionable whether the Legislature intended that section to refer to the contract of marriage. Indeed, the words of the section referring to bargains and conveyances would clearly seem to show that it was only intended to affect contracts relating to property.

Certainly the provision is not of universal application, for, under Pub. Laws 1898-99, p. 49, c. 549, § 11, there must be an implied exception in the case of a marriage contract to which the guardian consents in writing.

Upon the questions of interpretation thus raised, however, we refrain from expressing any opinion, as we think that, even assuming that the marriage would have been void in this state, yet as, so far as appears, it was lawfully celebrated in Massachusetts, it must be considered valid here. We are aware that the authorities are not entirely uniform upon this point, now for the first time presented in Rhode Island; but the general principle, as we gather it from text-writers and decisions, both English and American, is that the capacity or incapacity to marry depends on the law of the place where the marriage is celebrated, and not on that of the domicile of the parties. Sto. Conf. Law (8th Ed.) § 89. See *Id.* §§ 113, 121, 123a, 123b; *Bish. Mar., Div. & Sep.* vol. 1, § 843, and cases cited; *Putnam v. Putnam*, 8 *Pick.* (Mass.) 433; *Inhabitants of West Cambridge v. Inhabitants of Lexington*, 1 *Pick.* (Mass.) 506, 11 *Am. Dec.* 231; *Van Voorhis v. Brintnall*, 86 *N. Y.* 18, 40 *Am. Rep.* 505. In *Medway v. Needham*, 16 *Mass.* 157, 8 *Am. Dec.* 131, a statute made a marriage between a negro or mulatto and a white person void. A couple, one of whom was a mulatto and the other white, in order to evade the statute, came into Rhode Island, where such connections were allowed, were there married, and immediately returned. And the marriage, being good in Rhode Island, was held to be good in Massachusetts.

The reasoning upon which these cases proceed is well stated by Sir Edward Simpson in *Scrimshire v. Scrimshire*, 2 *Hagg. Cons.* 395. He says on page 417: "All nations allow marriage contracts. They are 'juris gentium,' and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good, or not according to the laws of the country where they are made. * * * By observing this law no inconvenience can arise, but infinite mischief will ensue if it is not."

The counsel for the guardian, however, cites several cases which at first sight seem to support the position that marriage in evasion of the laws of the domicile is invalid. Thus in *Estate of Stull*, 183 *Pa.* 625, 39 *Atl.* 16, 39 *L. R. A.* 539, 63 *Am. St. Rep.* 776, and *Pennegar & Haney v. State*, 87 *Tenn.* 244, 10 *S. W.* 305, 2 *L. R. A.* 703, 10 *Am. St. Rep.* 648, a statute forbade any person from whom a divorce was obtained on the ground of adultery to re-

marry. In both cases a party forbidden to marry went into another state and remarried. The second marriage in both cases was held invalid in the state where the party was domiciled. In *Dupre v. Boulard's Ex'r*, 10 La. Ann. 411, a statute forbade the intermarriage of blacks and whites, and it was held that any such marriage, although valid where performed, would not be recognized in Louisiana. To the same effect are *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683, and *Kinney v. Com.*, 30 Grat. (Va.) 858, 32 Am. Rep. 690. And in *Brook v. Brook*, 9 H. L. Cas. 145, *193, where a statute declared that a marriage with a deceased wife's sister should be invalid, it was held that such a marriage entered into between British subjects in a country where the marriage was not forbidden was absolutely void in England.

We consider these cases inconclusive. Most of them, if not all, fall within a well-recognized exception to the general rule laid down above, namely, that if a marriage is odious by the common consent of nations, or if its influence is thought dangerous to the fabric of society, so that it is strongly against the public policy of the jurisdiction, it will not be recognized there, even though valid where it was solemnized. Thus a polygamous marriage, although valid and binding in the country where it was contracted, would probably be denied validity in all countries where such unions are prohibited. See *In re Bethell*, 38 Ch. D. 220. Probably the rule would be the same in case of an incestuous marriage, although valid in the place where contracted. See *Bishop*, *supra*, § 858 et seq.; *Com. v. Lane*, 113 Mass. 458, 463, 18 Am. Rep. 509. The cases cited from Louisiana, North Carolina, and Virginia may be explained, then, on the ground that the tendency of such unions in those states was considered destructive of society; and their apparent conflict with *Medway v. Needham* rests, not upon any conflict of opinion regarding the general principle governing foreign marriages, but only upon the different conceptions of the courts regarding the importance of the public policy forbidding such marriages.

The first two cases cited by counsel for the respondent guardian are harder to distinguish, although we think that here, again, the difference in the result is attributable to the same difference in the conception of the public policy regarding such marriages. But if the cases really are in conflict, we believe that the current of authority is in favor of the principle already enunciated. It is true that in the important case of *Brook v. Brook*, *supra*, decided by the House of Lords, a contrary position was taken, and the Massachusetts cases were expressly disapproved. That case, however, although of great weight, has been considerably criticised, and is believed to be contrary to the weight of American authority. For a learned criticism of the case, see the opinion of Gray,

C. J., in *Com. v. Lane*, 113 Mass. 467 et seq., 18 Am. Rep. 509. See, also, *Bishop, supra*, § 827.

The case of *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366, has no bearing upon the question at issue. In that case the only question was whether the court of Massachusetts constitutionally could refuse to recognize a divorce granted by the court of South Dakota, in view of a Massachusetts statute providing that a divorce obtained in fraud of the laws of the domicile should be invalid; and it was held that, as the divorce was granted to one who had never obtained a bona fide domicile, the court of South Dakota never acquired jurisdiction, and hence the due faith and credit clause of the constitution did not require the enforcement of the decree in Massachusetts against the public policy of that state as expressed in its statutes. It is to be noticed that both the first and second marriages involved in that case took place in Massachusetts. And as to the invalidity of the divorce, it is clear that different considerations apply to the determination of the validity of divorces than to the validity of marriages procured in evasion of the law of the domicile. *Bishop, supra*, §§ 836, 837.

Coming now to the case in hand, it requires no argument to show that, even if the marriage might have been void if solemnized in this state, it is nevertheless not such a union that it can in any sense be considered so subversive of good morals, or so threatening to the fabric of society, as to fall within the exception to the general rule regarding foreign marriages. In other words, if valid in Massachusetts, it is equally valid here. As to its validity in Massachusetts, no authorities were cited by counsel, and we have not succeeded in discovering any Massachusetts statute or decision which would tend to show that the marriage is not valid there. Indeed, the only authorities we have found which seem to bear upon the point look the other way.

In *Parton v. Hervey, supra*, the facts were in some respects similar to those in the case at bar. The petitioner had married a female infant of the age of 13 years, with the free assent of said infant, but without the knowledge or consent of her mother, who was her only surviving parent. The latter, claiming that the marriage was invalid without her consent, locked her daughter up, and refused to allow her husband to have the custody of her person. The petitioner was allowed a writ of habeas corpus against the mother. The court say on page 122: "But in the absence of any provision declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, although had in violation of the specific regulations imposed by statute."

And in Inhabitants of Milford v. Inhabitants of Worcester, 7 Mass. 48, 54, 55, Parsons, C. J., said: "When a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without publication of the banns of marriage, and without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the officer would incur the penalty of fifty pounds for a breach of his duty." See Par. Cont. (9th Ed.) vol. 2, p. 93.

In the absence, then, of any showing that Mr. Chace was either an idiot or lunatic at the time of the marriage, we are of opinion that the marriage in Massachusetts was valid.

It is argued by counsel for the petitioner that, as there was at least the form of a marriage in this case, it can not be collaterally attacked, but must, for the purposes of this proceeding, be considered valid and binding. As the respondent's counsel took no notice of this point in his brief, however, and relies chiefly upon the invalidity of the marriage, we prefer to express no opinion upon that question, but to decide this branch of the case upon the ground selected by the respondent for his defense. * * *

The writ will issue as prayed.

RIGHTS AND DUTIES INCIDENT TO COVERTURE IN GENERAL

I. Right to Determine Family Domicile¹

PRICE v. PRICE.

(Supreme Court of Nebraska, 1906. 75 Neb. 552, 106 N. W. 657.)

Commissioners' opinion. Action by Bellizora Price against Daniel E. Price. There was judgment for defendant, and plaintiff appeals.

OLDHAM, C.² This was an action for support and maintenance instituted by the plaintiff wife against the defendant husband. The petition alleges the marriage between plaintiff and defendant in the city of Grand Island, Neb., April 12, 1900; that after the marriage plaintiff and defendant lived together as husband and wife in the village of Phillips, Hamilton county, Neb., until the latter part of August, 1900, when by mutual agreement plaintiff removed to the city of Grand Island with her children by a former marriage; that after plaintiff's removal to Grand Island defendant continued to visit and cohabit with her as her husband until the month of June, 1901, when defendant abandoned the plaintiff and refused and neglected to further provide for her support and maintenance. The petition prayed for a reasonable allowance from defendant's income for plaintiff's support. The answer admitted the marriage and denied each and every other allegation contained in the plaintiff's petition, and by way of cross-bill asked for a divorce from the plaintiff on the grounds of willful abandonment without just cause for more than two years. On issues thus joined there was a trial to the court and a judgment dismissing both the petition of the plaintiff and the defendant's cross-bill and taxing each of the parties with their own costs. To reverse this judgment plaintiff has appealed to this court.

There is very little conflicting testimony in the record; the contest mainly depending upon the presumptions arising from undisputed or clearly established facts, which may be briefly summarized as follows: At the time of the marriage, plaintiff was a widow and the mother of four children by her former marriage; the oldest one being a son about 18 years of age, and the younger ones being daughters, ranging in age from 9 to 16 years. Defend-

¹ For discussion of principles see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 36.

² Part of the opinion is omitted.

ant was a middle-aged man, a widower, who was the father of three children, all girls, ranging in age from 7 to 13 years. Each of the parties were of high moral and social standing. The defendant husband resided in the village of Phillips, about nine miles distant from the city of Grand Island, where the plaintiff wife resided at and before the marriage. After the marriage plaintiff and her three younger children resided with defendant and his children in the village of Phillips until the latter part of August, 1900. Plaintiff, at the time of the marriage, was the owner of a home in Grand Island of the value of about \$800, and also had \$1,000 loaned at interest, which she had received from her first husband.

It fairly appears from the record that, by mutual agreement between the husband and wife, the wife returned with her children to her home in Grand Island for the purpose of sending them to school there during the year 1900-01. While there is some suggestion in the record that this arrangement was without the approval of the husband, yet his conduct toward plaintiff after her removal to Grand Island shows that he acquiesced in her conduct, for he testifies that he visited her from time to time at her home in Grand Island and cohabited with her at the time of such visits and contributed small sums of money for her support during the school year of 1900-01. It is fairly suggested by the evidence that there existed some dissatisfaction between plaintiff and defendant during their residence in Phillips, on account of the interference of relatives of the two families of children in the management and government of the children.

When the school year had ended, defendant wrote to plaintiff, stating his inability to maintain the two families in the two places, and inquired her intention as to returning to live with him at Phillips. While the oral testimony shows that plaintiff had objected to going back to Phillips to live with defendant, yet she answered his letter, saying that she would return to live with defendant at Phillips when he provided a home there for her. Defendant owned no real estate and very little personal property at that time and relied on renting property to provide a home. He answered her letter telling plaintiff, in substance, to inform him when she intended to come to Phillips, that he might prepare for her, and suggested that she should help furnish the home and contribute to the support of her own children, if she should bring them with her.

Here follows the only material conflict in the testimony. Plaintiff claims that she answered this letter by a note asking him to come to see her to arrange for her return to Phillips, and that in response to this note defendant came to Grand Island and suggested to her that they could just as well continue to live apart, as they were, for the next three or four years, but that, if in the

meantime she wanted to come to Phillips to live, he might rent a house there. Defendant denies receiving this note, and denies the visit and conversation testified to by the wife. After this, defendant ceased corresponding with his wife and has never provided anything for her support and maintenance. In the following December defendant went to the city of Washington as a temporary secretary of Congressman Stark, and remained there in that capacity until the following April. During this time plaintiff wrote several communications to defendant offering to go and live with him at Washington, and later, when he had returned, she offered to live with him at Aurora, Neb. But defendant made no response to any of these communications and never again went to visit his wife.

We think there are certain elementary principles that should govern the judgment and finding in this case. The first is that it is the right and privilege of the husband to fix in good faith a domicile for himself and wife. Second, it is the duty of the wife to follow her husband to such domicile as he may provide in good faith and there to live and cohabit with him as his wife. It is also the primary duty of the husband to provide for the reasonable support and maintenance of his wife according to his rank, standing, and financial ability, when she accompanies him to the domicile which he has selected. The right of the wife to such reasonable support and maintenance can be defeated only when she willfully and without just cause either abandons the domicile of the husband, or commits some overt act inconsistent with her duty as a wife. The law presumes that a man does not intend to abandon his family, in the absence of cogent proof to the contrary (*Jennison v. Hapgood*, 10 Pick. [Mass.] 99), and the same rule applies with reference to the wife.

Now the only way that plaintiff could be defeated in her claim for reasonable support and maintenance would be by a finding of fact that she had voluntarily and intentionally and without good cause abandoned the domicile of her husband, which he had provided for her. From the evidence in this case, we are unable to find this fact. Plaintiff went to Grand Island with the consent and acquiescence of her husband. In every communication from her to the husband she has expressed a willingness to live with him whenever and wherever he might provide a home, although it does appear in the testimony that she had expressed a desire that the home should be at some other place than the village of Phillips. While defendant suggested in his communication to his wife an intention to procure a home for her, yet the evidence fails to show that he ever did so. We are therefore impressed with the conclusion that plaintiff has never done anything to defeat her right to a claim on the defendant for reasonable support and

maintenance according to his earning capacity and financial holdings. * * *

Judgment reversed.³

II. Torts of Married Women⁴

NORRIS v. CORKILL.

(Supreme Court of Kansas, 1884. 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489.)

Action by Lavina Norris against Marsha Corkill and T. D. Corkill—who are husband and wife—for damages for the speaking of certain slanderous words by Marsha Corkill, wife of T. D. Corkill, of the plaintiff, Lavina Norris. The petition alleged that the defendants were husband and wife, and that the slanderous words were spoken by the wife, Marsha Corkill, of the plaintiff, Lavina Norris. The defendant T. D. Corkill demurred to the petition as not stating facts sufficient to constitute a cause of action against him. The trial court sustained the demurrer and dismissed the case as to T. D. Corkill, and the plaintiff brings error.

HORTON, C. J. The question presented in this case is whether the husband is liable for the slanderous words spoken by his wife when he is not present, and in which he in no manner participates. The rule of the common law makes the husband liable for the torts of his wife committed during coverture. The reason assigned for this liability is that the husband is entitled to the rents and profits of the wife's real estate during coverture, and the absolute dominion over her personal property in possession. Another ground of this liability at common law, sometimes given, is that the wife by her marriage is entirely deprived of the use and disposal of her property, and can acquire none by her industry; that her person, labor, and earnings belong unqualifiedly to the husband. Reeves, Dom. Rel. 3; Tyler, Inf. & Cov. § 233. Again, the husband, also, by common law might give the wife moderate correction; for, as he was to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children, for whom the master or parent is also liable in some cases to answer. 1 Bl. Comm. (Wendell's Ed.) 444, 445.

³ The wife may under certain circumstances (as for purposes of divorce when husband has been guilty of misconduct) acquire a new domicile. Atherton v. Atherton, 181 U. S. 166, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901).

⁴ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 39-42.

Under the provisions of our statute, the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore, in our opinion, under the changes made by the statute, the liability no longer exists. It is a part of the common law that where the reason of the rule fails, the rule fails with it. At common law the husband had control almost absolute over the person of the wife; he was entitled, as the result of their marriage, to her services, and consequently to her earnings, to her goods and chattels; had the right to reduce her choses in action to possession during her life; could collect and enjoy the rents and profits of her real estate, and thus had dominion over her property and became the arbiter of her future. She was in a condition of complete dependence; could not contract in her own name; was bound to obey him; and her legal existence was merged in that of her husband, so that they were termed and regarded as one person in law. *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578; *Tyler, Inf. & Cov. c. 19*, §§ 216-233.

Under the statute, "the property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts." Comp. Laws 1879, § 1, c. 62. Again, "a married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." Section 2, c. 62. Further, "any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account, and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." Section 4, c. 62. In addition, section 3 of said chapter provides that a woman may, while married, sue and be sued in the same manner as if she were unmarried. Therefore, it is not true, under the existing statute, that the wife, by her marriage, is deprived of the use and disposal of her property, nor is she prohibited from acquiring property by her own industry. It is not true, under the statute, that the personal property of the wife passes to the husband; nor is he entitled to the rents and profits of her real estate during coverture; nor has he any dominion over her personal property, her labor, or her earnings. If she so desires, they are unqualifiedly her own, and he cannot interfere with them.

Again, in this state, the common-law power of correction of the

wife by the husband is no longer tolerated. Under the common law the married woman's legal existence was almost entirely ignored. She was sunk into almost absolute nonentity, and rested in almost total disability; but all of this has been changed by the statute, and to-day, in our state, "her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself." *Martin v. Robson, supra.* We think the provisions of our statute change the common-law rule, and thereby discharge the husband from liability for the torts of the wife committed when he is not present, and with which he has no connection. The wife stands upon an equality in this state in all respects with the husband. She is alone responsible for her contracts, and should be alone responsible for her acts. We have examined the various authorities conflicting with these views, but owing to the provisions of our statute we are not inclined to follow them, and therefore think it unnecessary to refer to them.

The judgment of the district court will be affirmed.⁵

KELLAR v. JAMES.

(Supreme Court of Appeals of West Virginia, 1907. 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. [N. S.] 1003.)

Action by Verna Kellar against Nancy E. James and George M. James for slander. From a judgment of dismissal, plaintiff brings error.

POFFENBARGER, J. In the circuit court of Tucker county, a demurrer was sustained to the declaration of Verna Kellar, alleging against the defendants, Nancy E. James and George McClellan James, slander and defamation of the character of the plaintiff, and to the consequent judgment of dismissal she obtained a writ of error.

The defendants were husband and wife, and the declaration charges, first, the utterance of slanderingous language by the husband in the presence of certain persons named as well as others; second, the utterance of the same language by the wife in the presence of certain other persons named; and, third, the utterance of the language by both defendants in pursuance of a conspiracy, previously formed between them, and the speaking and publication of the false, scandalous, malicious, defamatory, and insulting words, by collusion and conspiracy, with intent to defame and disgrace the plaintiff among her friends and neighbors and the citizens of the state, and to bring into disgrace and disrepute her good name, fame, and character.

⁵ See, also, *Schuler v. Henry*, 42 Colo. 307, 94 Pac. 360, 14 L. R. A. (N. S.) 1009 (1908), where authorities are collected and discussed.

In reply to the view that the declaration sets up two causes of action, one against the husband alone for his wrongful act, and the other against both husband and wife for the wrongful act of the latter, and so is open to the objection of misjoinder of actions, it is urged that all the matters alleged constitute one cause of action, founded upon the charge of conspiracy, and this argument is supplemented by the contention that such a conspiracy between the husband and wife may now exist because of the supposed change in the status of the wife, wrought by our married women's statutes. These statutes, very similar in character and form to those adopted in other states, relate, for the most part, to the separate property of the wife, her rights and powers respecting the same, and freedom thereof from the control of the husband, and liability for his debts, and the enlargement of the rights and powers of married women respecting contracts and enforcement of the same. To a certain extent, they also free the husband from liability for the debts of the wife. Though not in exact conformity with the terms or scope of similar statutes of other states, the respects in which our statutes differ from them are relatively slight and unimportant.

The primary object and general scope thereof are the same as those of modern married women's laws in other jurisdictions. In some states the courts have exonerated the husband from liability for the torts of the wife, without any warrant therefor in the letter of the statute, on the presumption of legislative intent to do so, arising out of deprivation of the husband of the control of the wife's property, and relief of the same from liability for his debts. These statutes are construed, in the jurisdictions in which such effect is given them, as if they had declared that a married woman should be deemed in all respects, as regards her power to contract, own, control, and manage property and liability for her acts and conduct, wrongful or otherwise, as if she were a *feme sole*. In doing so, the courts admit an interpretation which goes far beyond the letter of the statute.

They set aside the common law in respect to matters as to which the statute is wholly silent, notwithstanding the rule requiring strict construction of all statutes in derogation of the common law. Moreover, they assume that the only reason for the husband's common-law liability for the wife's torts is found in the control which that law gave the husband over her property, notwithstanding the existence of other common-law principles and considerations which may reasonably be said to form, at least, a part of the ground of such liability. For many purposes, the wife's existence was deemed by that law to have been merged in that of the husband. She had no separate existence in law, and they were considered one person. In respect to the commission of many crimes, and wrongs not amounting to crime, done by the wife in the pres-

ence of her husband, she was deemed to have acted under his coercion, and was not liable either civilly or criminally. 21 Cyc. 1355.

Our statute makes no reference to her liability or that of the husband for her wrongs. This branch of the law remains wholly untouched by any terms of the statutes. It seems to us that the application to them of the liberal rule of construction would not carry them into this untouched portion of the domain of law relating to married women and their relations to their husband and third parties. The liberal rule of construction only requires that a statute be so enforced as to carry into effect the will of the Legislature as expressed in the terms thereof, and give, not stintedly or niggardly, but freely and generously, all the statute purports to give. This stops far short of carrying the statute to purposes and objects entirely beyond those mentioned in it.

One object of these statutes is to enable a married woman to have the absolute, free, and unrestrained control of her property, and power to make contracts respecting it, and to vindicate her property and contract rights by action in the courts of the state as if she were a feme sole. For the accomplishment of these purposes, the statute should be liberally construed. She is subjected, by this same law, to the reciprocal right extended to others to sue her in the courts as if she were a feme sole, and, for the effectuation of this purpose, the statutes should be liberally construed. So, in respect to all the other rights and liabilities expressly given and imposed by this law. The evils intended to be suppressed, and the purposes and objects to be promoted, are all mentioned in the statutes, and the rule of liberal construction requires no more than that they shall be so interpreted and applied as to suppress the named evils, and effectuate the specified purposes and objects. It does not authorize the court to add other supposed evils, purposes, and objects.

By the decided weight of authority, these statutes are held not to have relieved the husband from his common-law liability for the wife's torts, as has been well said by Judge Brannon in *Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655, 45 Am. St. Rep. 928, and in *Withrow v. Smithson*, 37 W. Va. 761, 17 S. E. 316, 19 L. R. A. 762. Though these expressions of opinion may not be regarded as matters of decision, their reasoning is valuable, and they show that the weight of authority is against the contention set up in the brief of counsel for plaintiff in error. To the authorities there cited by Judge Brannon in support of his opinion, we add the following: *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160; *Morgan v. Kennedy*, 62 Minn. 348, 64 N. W. 912, 30 L. R. A. 521, 54 Am. St. Rep. 647; *Bruce v. Bombeck*, 79 Mo. App. 231; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947; *Taylor v. Pullen*, 152 Mo. 434, 53 S. W. 1086; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Fow-*

ler v. Chickester, 26 Ohio St. 9; Zeliff v. Jennings, 61 Tex. 458; McQueen v. Fulgham, 27 Tex. 463; Seroka v. Kattenburg, 17 Q. B. D. 177; Bahin v. Hughes, 31 Ch. D. 390.

No authority need be cited for the proposition that the wife is not liable for the slander or other tort of the husband. The only qualification of this general rule is found in those instances in which the husband acts as the agent of the wife in respect to her separate property; and this is only an apparent exception, for there the act of the husband, her agent, is, in law, her act. By the common law, the wife could not be a trespasser by previous or subsequent consent to the act or trespass of the husband. She did not become liable except by her active, actual participation in the wrongful act. "A married woman is liable for torts actually committed by her, though she cannot be a trespasser by prior or subsequent assent." Chitty, Pl. (11 Am. Ed.) 76. "And where several are concerned, they may be jointly sued, whether they assented to the act before or after it was committed, unless the party be an infant or a feme covert, who, we have seen, cannot be sued in respect to a subsequent assent." Id. 80.

This doctrine is recognized in Ferguson v. Brooks, 67 Me. 251, in the following terms: "That this doctrine is still properly applicable to numerous actions of tort brought against married women, we do not doubt. We should be inclined to say, for example, that a wife ought not to be held liable for the tort of her husband or any third party, in which she does not participate as an actor, by reason of prior or subsequent assent, consent, advice, or authority from her, in a case where she is not in any contingency to reap a profit, or her separate estate a benefit." In view of this principle of law, the allegation of conspiracy amounts to mere surplusage.

It is utterly impossible that the wife can be held liable for the slander uttered by her husband in her absence, on the theory that she counseled, advised, or directed it, or assented to and ratified it after it was done. From this it results that the declaration necessarily sets up two separate and distinct causes of action, one against the husband, and one against the husband and wife. As to the latter, if maintained, judgment would go against both (Gill v. State, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655, 45 Am. St. Rep. 928, and the numerous authorities there cited); and, as to the former, against the husband alone. To allow recovery upon a declaration setting up both of these causes of action would make the wife liable for the husband's tort, contrary to law. This makes the declaration fatally defective, wherefore the court properly sustained the demurrer, and dismissed the action, instead of entering a mere judgment of abatement for misjoinder of parties. A misjoinder of counts or causes of action is fatal to the declaration

on demurrer. *Malsby v. Lanark Co.*, 55 W. Va. 484, 47 S. E. 358; *Henderson v. Stringer*, 6 Grat. (Va.) 130. This obvious and inevitable result renders it unnecessary to discuss the numerous other questions of law adverted to in the argument.

There being no error, the judgment will be affirmed.⁶

III. Torts Against Married Women⁷

SKOGLUND v. MINNEAPOLIS ST. RY. CO.

(Supreme Court of Minnesota, 1891. 45 Minn. 330, 47 N. W. 1071, 11 L. R. A. 222, 22 Am. St. Rep. 733.)

GILFILLAN, C. J. The plaintiff and his wife, while riding in one of defendant's cars, were both at the same time injured by the same accident or act of negligence of defendant. Plaintiff brought an action, and recovered for the injury to himself. He brings this action alleging the negligence of the defendant, the injury to his wife, in consequence whereof he lost her services and society, and was put to expenses for physicians and medicines and the care of his wife. In its answer the defendant alleged the former action, and recovery by plaintiff, in bar of this action, and the court below held it a bar, and ordered judgment for defendant on the pleadings. This appeal is from an order denying plaintiff's motion for a new trial.

The case raises the question, was the cause of action in the first action the same as in this? Is this an attempt to recover damages that belonged to that cause of action? We think the decision of the court below was erroneous, not because one action was to recover for an injury to what are termed the absolute rights of plaintiff, and the other for injury to his relative rights, or rights he possessed by reason of his relation to his wife, but because his right to recover in this case will depend on a different state of facts from those which would sustain a recovery in the other case. In the action for injury to himself all he needed to show in order to recover nominal damages at least, was the negligence of the defendant, and the consequent injury to himself. But proof of the negligence and injury to the wife would not sustain the hus-

⁶ Accord: *Morgan v. Kennedy*, 62 Minn. 348, 64 N. W. 912, 30 L. R. A. 521, 54 Am. St. Rep. 647 (1895); *Jackson v. Williams*, 92 Ark. 486, 123 S. W. 751, 25 L. R. A. (N. S.) 840 (1909).

⁷ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 44.

band's action in this case. The cause of action which those facts alone show belongs to the wife. Those facts go to make up the husband's cause of action, but alone they are not enough. In addition to them there must exist the fact that, by reason of the injury so caused, he has been deprived of her society or services, or has been put to expense. Such loss is of the substance of his cause of action.

As said in *Todd v. Redford*, 11 Mod. 265: "Husband and wife cannot join in assault and battery per quod consortium amisit, for the per quod in such case is the gist of the action." In other words, the gist of the husband's cause of action on account of an injury to his wife is not the injury itself, but the consequence of the injury in depriving him of his common-law right to her society or services, or in imposing on him the common-law duty to care for her. A case may easily be imagined where, for an injury to her person, a cause of action—a technical cause of action at least—would instantly accrue to the wife, but where none would ever accrue to the husband, for the reason that none of the above injurious consequences to his relative rights would follow.

Where a cause of action arises from a wrongful injury, it arises at once; and in such case the subsequently ascertained or developed consequences of the injury are items that might exist without them. But in an action by a husband on account of an injury to his wife the consequences of loss of her society or services are not items of damages pertaining to an already existing cause of action, or to a cause of action which might exist without them, but they are essential to the cause of action itself, which cannot arise until such consequences have followed the injury. If it could be said that the plaintiff's cause of action in his first action arose upon the negligence alone, then all the injurious consequences of that negligence, the injury to his person, the loss of his wife's society and services, caused by the injury to her person, might be regarded as items of damage in that cause of action. But no cause of action could accrue upon the negligence alone. That cause of action accrued only upon injury to his person caused by the negligence, and, when they concurred, his cause of action was complete. The loss of his wife's services had no connection with that injury. That cause of action was not a consequence of it, and not an item of damage pertaining to it. His right to recover for such loss was independent, and would have existed had that cause of action not accrued.

We have been able to find but two cases in the United States analogous to this. In *Railroad Co. v. Chester*, 57 Ind. 297, the plaintiff had joined in one count a cause of action for an injury to himself with a claim for damages for loss of services of his wife, and for expenses in healing injuries to his child; the three having been injured at the same time by the same negligence of

defendant. On defendant's motion to require plaintiff to state the separate claims for damage in separate counts or paragraphs, the supreme court held the motion properly denied, saying: "It seems to us * * * they would really constitute but a single cause of action." *Town of Newbury v. Railroad Co.*, 25 Vt. 377, was an action by the town to recover damages it had been compelled to pay for an injury to the person caused by a defect in a highway which, as between it and the town, defendant was under a duty to keep in repair. Husband and wife were at the same time injured in consequence of the defect. The husband sued the town for the injury to himself, recovered judgment, which the town paid, and sued and recovered against defendant for that. The husband also sued the town and recovered judgment on account of the injury to his wife, and the town paid it, and sued defendant for it. The defendant pleaded in bar the former recovery against it. Speaking of the recovering against the town on account of the injury to the wife, in reference to the recovery for injury to the husband, the court, Redfield, C. J., said: "For it is as much a distinct matter as if the persons had been strangers to each other, and as much, I think, as if the persons had been injured at different times, by reason of the same neglect of defendant."

The two cases seem directly opposed to each other, though neither is particularly satisfactory as an authority. So far as they determine the question here involved, the latter is more consistent with principle. Order reversed.⁸

IV. Action for Enticing or Alienation of Affection⁹

SIMS v. SIMS.

(Court of Errors and Appeals of New Jersey, 1910. 76 Atl. 1063, 29 L. R. A. [N. S.] 842.)

Action by Myra V. Sims against Winfield S. Sims and others. From an order sustaining a demurrer to the complaint (77 N. J. Law, 251, 72 Atl. 424), plaintiff brings error.

MINTURN, J. The suit was instituted to recover damages from defendants for maliciously enticing away the plaintiff's husband,

⁸ Accord: *Smith v. City of St. Joseph*, 55 Mo. 456, 17 Am. Rep. 600 (1874). See, also, *Holleman v. Harward*, 119 N. C. 150, 25 S. E. 972, 34 L. R. A. 803, 56 Am. St. Rep. 672 (1896), where a husband was allowed to recover from a druggist who sold laudanum to the wife, in consequence of which she became a confirmed subject of the opium habit.

⁹ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 45, 46.

and thereby alienating from her his affections. A demurrer was interposed upon the general ground that suit will not lie for such an injury, and the Supreme Court having sustained the demurrer, the legal question thus raised is now presented upon writ of error.

The plaintiff bases her right to sue upon an act passed in 1906 entitled "An act for the protection and enforcement of the rights of married women" (P. L. 1906, p. 525). The act provides that "any married woman may maintain an action in her own name and without joining her husband therein, for all torts committed against her, or her separate property, in the same manner as she lawfully might if a feme sole; provided, however, that this act shall not be so construed as to interfere with or take away any right of action at law or in equity now provided for the torts above mentioned." The second section provides that "any action brought in accordance with the provisions of this act may be prosecuted by such married woman separately in her own name, and the non-joinder of her husband shall not be pleaded in any such action."

It is urged in support of the demurrer that this act created no new right of action in behalf of the married woman, and that at common law no right of action existed for the tort alleged in this declaration; and this construction of the act was adopted by the Supreme Court. The initial inquiry, therefore, must necessarily be made in the light of the fundamental rule of statutory construction, which requires us to search out the old law and the mischief that it engendered, in order to ascertain whether the remedial legislation with which we are now dealing was intended by the Legislature to apply to such a condition.

In its early stages the common law notoriously enveloped the identity of the wife and all her possessions in the personality of the husband; and as late as *Wilson v. Alpaugh*, 52 N. J. Eq. 589, 33 Atl. 50, the doctrine "that the rule of the common law that the husband and wife are to be regarded as one person" was held not to have been abrogated by legislation up to that period in this state.

That the right of consortium was recognized by the common law as an existing right in the married woman, however, but incapable of enforcement, owing to the common-law doctrine of identity of personality, is made clear by Blackstone, who, in his third volume, dealing with "Private Wrongs," mentions a class in which the common law, failing to provide a remedy, recognized the right of the ecclesiastical courts, or their successor, to administer redress, not "for the reformation of the party injuring, but for the sake of the party injured; to make him a satisfaction and redress for the damages which he has sustained." 3 Bl. Com. 87. Under this general topic the learned commentator treats of "matrimonial causes, or injuries respecting the rights of marriage," and says: "The suit for the restitution of conjugal rights is also another

species of matrimonial causes which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again." Id. 94.

This recognition by the common law of the fact that the loss of consortium was an injury to the wife, and that its enforcement was her right, and the corresponding failure, on the other hand, to provide her with a legal remedy for the tort, is properly, definitive of her status at common law, and places that branch of legal learning upon its proper footing. From which it follows that if at any time the Legislature should remove the common-law impediment as to remedy, the right existing is thus made capable of enforcement under the remedial code. 21 Cyc., note 50, and cases cited.

That the common-law courts failed to find a remedy is, under the decisions, rather a recognition of the right, than a denial of its existence. For it may be said that the history of common-law procedure is largely the history of substantive rights, remediless at first for lack of a suitable writ or precedent in the Registrum Brevium, until the persistence of the demand for a remedy developed the action of trespass on the case as a general specific in consimili casu, under the provisions of the statute of Westminster II. The following cases serve also to illustrate the existence of this right at common law: Firebrace, 4 P. B. 63; Yelverton, 1 Siv. & Tr. 586; Orme, 2 Add. Ecc. 382; Reg. v. Jackson, 1 Q. B. 685.

The very helpful briefs of the learned counsel in this case instance the case of Lynch v. Knight, 9 H. L. Cas. 577, 11 Irish Jurist, 284, which is highly instructive upon this phase of the question, as illustrating the endeavor of the English judges at that time to supply a remedy for a conceded, existing right. "Can it be," inquired the Chief Justice of the Irish Queen's Bench, "that for an injury of this sort a wife can have no redress? Is it possible to sustain the proposition?" When the case was determined upon another ground in the House of Lords, Lord Campbell said: "Nor can I allow that the loss of consortium or conjugal society can give a cause of action to the husband alone; I think it may be a loss which the law may recognize to the wife as well as to the husband."

These sentiments have found expression and recognition in the adjudications of the highest courts of our states; and now it may be fairly stated that the great weight of authority in this country supports the proposition that the right to the consortium of the husband was recognized at common law as a right inherent in the wife, enforceable, however, owing to the policy of the times, only in an action jointly by husband and wife. Bennett v. Ben-

nett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258; *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213; *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075; *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838; *Bassett v. Bassett*, 20 Ill. App. 543; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Mehrhoff v. Mehrhoff* (C. C.) 26 Fed. 13; *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119; *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. 341; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759.

So, too, the modern text-writers of authority support its existence. "By the great weight of authority," says Tiffany, "since the loss of service is not necessary to the action and the right to each other's society and comfort is reciprocal, a wife may maintain such an action, even at common law and in the absence of such a statute." *Domestic Relations*, 78. To the same effect are: Jaggard on *Torts*, p. 467; Bigelow on *Torts*, p. 153; 21 Cyc. 1618.

Three states alone have been classified as denying the existence of the right. In Wisconsin, in the early case of *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79, it was determined, in effect, upon the theory that the absence of remedy at common law determined the nonexistence of the right. The case was followed upon the doctrine of *stare decisis* in *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961, by a divided court, two of the learned judges contributing vigorous dissenting opinions to the discussion. The adjudications in the Maine court rest upon opinions based upon the court's view of an expedient public policy in that state, and are of no force as arguments upon the question of the existence or nonexistence of a common-law principle. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; *Morgan v. Martin*, 92 Me. 190, 42 Atl. 354.

We are finally referred to the determination of our own Supreme Court in 1903, in *Hodge v. Wetzler*, 69 N. J. Law, 490, 55 Atl. 49, which furnishes ratio decidendi for the determination of the Supreme Court in this controversy. *Hodge v. Wetzler*, however, as we read it, does not attempt to decide the question, but, per contra, Mr. Justice Hendrickson, in the absence of such a statute as that sub judice, and reviewing the question only from the power conferred by the then existing married woman's act (Gen. St. p. 2012), and the twenty-third section of the practice act (Gen. St. 2536), concluded that these statutes did not confer the right of action. But upon the question as to the existence of the right at common law the learned justice was careful not to commit the court, and said: "We do not deem it necessary in this case to discuss the question of abstract right, for the reason that, con-

ceding its existence, we fail to find a statute of this state empowering a married woman to sue as a feme sole in actions of this character." Page 492 of 69 N. J. Law, page 50 of 55 Atl.

The question therefore presented in this case, in the light of the act of 1906, is res nova, and the conclusion we have reached is supported by the great weight of authority. That this act was intended to confer the power upon a married woman to protect and enforce her rights, is the specific announcement contained in its title. The body of the act declares that she may maintain an action as a feme sole might lawfully do, and without joining her husband therein for all torts committed against her or her property. Keeping in mind the old law and the existing mischief, it becomes manifest that the legislative intent which inspired this remedial measure could have been only a desire to confer upon the married woman that equality of remedy as an independent suitor, which would enable her to vindicate her right in personam for a tort committed against her, and thus remedy the inequality to which she was subjected by the common law.

The judgment of the Supreme Court should be reversed and judgment rendered in favor of the plaintiff, quod recuperet, etc., and the record remitted to the Supreme Court for execution of a writ of inquiry and the entry of final judgment for the damages thus ascertained, with costs, including the plaintiff's costs in this court (2 Tidd Pr. 1180; Meeker v. City of East Orange, 77 N. J. Law, 623, 74 Atl. 379, 385, 25 L. R. A. (N. S.) 465, 134 Am. St. Rep. 798) unless the Supreme Court shall, on application made for that purpose, grant leave to the defendants to plead to the merits of the action.

RIGHTS IN PROPERTY AS AFFECTED BY COVERTURE

I. Wife's Earnings¹BLAECHINSKA v. HOWARD MISSION & HOME FOR
LITTLE WANDERERS.(Court of Appeals of New York, 1892. 130 N. Y. 497, 29 N. E. 755, 15
L. R. A. 215.)

Action by Hedwig Blaechinska against the Howard Mission & Home for Little Wanderers to recover damages which the plaintiff claims to have sustained through the negligence of the defendant in maintaining a broken cover over a coal-hole in a public sidewalk, which caused her to fall and break her arm. There was judgment for plaintiff. Defendant appeals from a judgment of the general term affirming the said judgment, and also affirming an order denying a motion for a new trial.

VANN, J. Upon the trial of this action the plaintiff testified that, at the time she was injured, she was living with her husband, a custom tailor, for whom she worked as a seamstress. She was then asked by her counsel, "Were you in receipt of a salary from him?" and under objection answered: "Yes, I received a salary of five and six dollars a week; and I did all the housework, and now I can't do it, and I must have help. I used to do very good tailoring, but I can't do it now." On her cross-examination, she testified that she used the money thus earned by her for the children, and the general support of the family. It did not appear that she had any separate estate or business. The court charged the jury that the plaintiff, if she could recover at all, was entitled "to recover for the loss of wages which she has sustained." The exceptions taken by the defendant to these rulings present the only question that we are asked to decide on this appeal.

The learned general term affirmed the judgment of the circuit on the ground that the money which the plaintiff had been accustomed to receive from her husband for services rendered outside of her household duties was her own property, and that the loss of the salary could be given in evidence as an element of damage, the same as if she had been working for a stranger. The only cases cited in support of this conclusion are Brooks v. Schwerin, 54 N. Y. 343, and Reynolds v. Robinson, 64 N. Y. 589. The ena-

¹ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 48.

bling act of 1860 (Laws 1860, c. 90, as amended by Laws 1862, c. 172,) makes separate property out of that which a married woman "acquires by her trade, business, labor, or services, carried on or performed on her sole and separate account." As the husband is entitled to the services of his wife at common law, it has uniformly been held that the statute does not apply to labor performed by her for him in his household, even if it is of somewhat extraordinary character. *Reynolds v. Robinson*, 64 N. Y. 589; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160. But the husband's right to the services of his wife is not limited to those performed for him in his house; for, when she works for him out of doors upon his farm, she is entitled to no pecuniary compensation, and his written promise to pay her therefor is without consideration. *Whitaker v. Whitaker*, 52 N. Y. 368, 371, 11 Am. Rep. 711. When she works with her husband for another, and their joint earnings are used to support the family, if there is no special contract that she is to receive the avails of her labor, they belong to him, and he is entitled to recover their value. *Birkbeck v. Ackroyd*, 74 N. Y. 356, 30 Am. Rep. 304; *Id.*, 11 Hun, 365; *Beau v. Kiah*, 4 Hun, 171.

Until recently the power of a married woman to make general contracts, not relating to labor to be "performed, on her sole and separate account," depended upon the act of 1860; and the possession of a separate estate, or engagement in a separate business, was essential to their validity, although she might become liable through her representations by estoppel. *Linderman v. Farquharson*, 101 N. Y. 434, 5 N. E. 67; *Frecking v. Rolland*, 53 N. Y. 422; *Insurance Co. v. Babcock*, 42 N. Y. 613, 1 Am. Rep. 601; *Bodine v. Killeen*, 53 N. Y. 93. In 1884 her powers were amplified so that she may now enter into contracts to the same extent, with like effect, and in the same form, as if unmarried, whether such contracts relate to her separate estate or not; but this enlargement of her rights does not extend to any contract between herself and her husband. Laws 1884, c. 381. She has further been authorized by statute to convey lands directly to, and to accept conveyances directly from, her husband, without the intervention of a third person. Laws 1887, c. 537. Under the act of 1860, she could contract with her husband in relation to her separate estate; for as to that she stood "at law on the same footing as if unmarried." *Noel v. Kinney*, 106 N. Y. 74, 78, 12 N. E. 351, 60 Am. Rep. 423; *Stanley v. Bank*, 115 N. Y. 122, 22 N. E. 29; *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; *Suau v. Caffe*, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593; *Bank v. Guenther*, 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780; *Owen v. Cawley*, 36 N. Y. 600; *Bodine v. Killeen*, 53 N. Y. 93; *Frecking v. Rolland*, 53 N. Y. 422; *Knapp v. Smith*, 27 N. Y. 277; *Seymour v. Fellows*, 77 N. Y. 178. The contract in *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E.

1029, 6 L. R. A. 559, 15 Am. St. Rep. 524, was doubtless regarded as not relating to the separate estate of the wife; and on this basis it is not in conflict with the authorities cited above.

But, while she can thus contract with her husband with reference to her separate property, can she make a binding agreement with him as to her own services, to be rendered outside of her household duties, and having no connection with a separate business or estate? In other words, can she hire out to him, to work in his store, or factory, and compel him to pay the price agreed upon for her services? If she can, it follows that the plaintiff was entitled to her earnings under the contract that may be implied from the payment of wages to her by her husband, and, her ability to earn having been impaired by the negligence of the defendant, the fact was properly proved before and submitted to the jury; otherwise, the evidence objected to was improperly received, and it was error to instruct the jury that they might consider it in assessing the damages. As a man cannot make a valid contract to pay his wife for extraordinary services rendered in his household or for working on his farm, how can he make a valid contract to pay her for helping him make clothes in his business as a custom tailor? What basis is there for any distinction? Does the statute which so modified the common law as to give to the wife her earnings from her own labor, performed on her "sole and separate account," contemplate that services for her husband can be performed on her "sole and separate account," unless they have some relation to a separate estate?

Under the rule laid down in *Coleman v. Burr* and *Whitaker v. Whitaker*, *supra*, the words "sole and separate account," as used in the statute, cannot mean simply an election on the part of the wife to work for her own benefit, regardless of whom the work is done for. In those cases, her election to work for herself, although manifest, did not take the contract out of the common-law rule. In deciding *Whitaker v. Whitaker* the court used this significant language: "If a wife can be said to be entitled to higher consideration or compensation because she labors in the field instead of in her household, * * * the law makes no such distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services." It seems to be the policy of the legislature, as indicated by recent enactments, to relieve every married woman of the disability of cōverture in contracting with any one except her husband. As to him the restriction is continued, except that the formality of conveying real estate through the medium of a third person is no longer required. The object of the legislature was, probably, to protect the marital relation, as well as to prevent the perpetration of frauds upon creditors. Every experienced observer realizes that an unlimited right on the part of the wife to contract with her hus-

band would afford an easy cover for fraud, and would be a perpetual menace to creditors.

The enabling statutes do not relieve a wife of the duty of rendering services to her husband. While they give her the benefit of what she earns, under her own contracts, by labor performed for any one except her husband, her common-law duty to him remains; and, if he promises to pay her for working for him, it is a promise to pay for that which legally belongs to him. The fact that he cannot require her to perform services for him outside of the household does not affect the question, for he could not require it at common law. Such services as she does render him, whether within or without the strict line of her duty, belong to him. If he pays her for them, it is a gift. If he promises to pay her a certain sum for them, it is a promise to make her a gift of that sum. She cannot enforce such a promise by a suit against him. We think the rule is well stated by a recent writer when he says that the enabling acts do not apply to the labor performed by a married woman "for her husband, or bestowed on his business, or in his household, or in his care, or in the care of his family; for in such cases it is her marital duty, and he is not liable to pay for the services of his wife." Kelly, *Cont. Mar. Wom.* 153.

These views are not in conflict with *Brooks v. Schwerin*, 54 N. Y. 343. The plaintiff in that case—a married woman—lived with her husband, and took charge of the family. Having been injured by the negligence of the defendant, she was allowed to show, under objection, on the trial of an action brought to recover damages therefor, that she had worked out, and received 10 shillings a day. The court refused to charge that she could not recover for her time and services while disabled. It was held by three out of the five commissioners who participated in the decision that the evidence was competent, and that the request was too broad, and was properly refused for that reason. The distinction between that case and this is that in the former the wife worked for a third person, while in the latter she worked for her husband. When she worked for a stranger it was on her sole and separate account, and the enabling act protected her contract. When she worked for her husband, it was on his account, and the statute did not apply.

In *Filer v. Railroad Co.*, 49 N. Y. 47, 10 Am. Rep. 327, a leading case upon the subject, it was held that a wife, not engaged in business, or in performing labor on her sole and separate account, when injured by the wrongful act of another, could not recover consequential damages resulting from her inability to labor. The court said: "Her services and earnings belonged to her husband; and for the loss of such services, caused by the accident, he may have an action. * * * She is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury and for direct and immediate damages, un-

less she is, on her own account and for her own benefit, engaged in some business in which she sustains a loss."

While we have considered, we have not cited, many cases that bear more or less directly upon the general subject, but have referred to such as declare, limit, and illustrate the law relating to the capacity of a married woman to contract with her husband in relation to her own services. Applying the law, as we gather it from the statute and the manifold decisions, to the facts of this case as now laid before us, we think that the plaintiff is entitled to recover actual damages only, and that the consequential damages for loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. The damages for the injury to her person belong to her, because the statute has given them to her; but the damages for the loss of her services belong to him, because the common law gave them to him, and the statute has not taken them away. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur.

NUDING et al. v. URICH.

(Supreme Court of Pennsylvania, 1895. 169 Pa. 289, 32 Atl. 409.)

A writ of fi. fa. was issued on a judgment in favor of B. Nuding and another against Samuel Urich, on which \$411 was realized. Anna Urich, wife of Samuel, presented a preferred claim to the sheriff for \$108, alleged to be due under a contract with her husband as his servant. The court of common pleas held the contract valid, and distributed to Mrs. Urich the amount of her claim, and the judgment creditors appeal.

GREEN, J. If Mrs. Urich had been employed by a stranger to perform the same services that she rendered in this case, and for the same wages, and her husband had consented to such employment, the wages to be paid to her, there can be no doubt she would have had a valid legal title to the earnings, and could have sustained her claim against his will, although he might subsequently have claimed the wages on the ground that he was the owner of her earnings as her husband. And the reason why she could recover them as against him would be because he had so contracted. In other words, his legal right to her earnings in the absence of a contract would be gone, because of her contract made between him and her. Where he agreed that she might have the earnings, he certainly forfeited any claim that he might otherwise have to them, and thereby surrendered such claim to her. If now he makes a contract directly with his wife that he, having occasion for extra and unusual service in the course of his business outside of his

family relation and needs, will pay his wife for the performance of such service the special wages which otherwise he would be obliged to pay to strangers, it is at least true that, so far as he is concerned, he has surrendered to his wife all claim to be the owner of her services, and therefore, of the compensation which he has agreed to pay her. His consent that she shall receive the compensation for the service certainly divests the case of the aspect that he, as the owner of her services, and therefore of her earnings, is entitled to both, against her will, and that element of the contention is removed from the argument.

What, then, is left? Nothing but the proposition that a husband and wife cannot make such a contract. Why not? There is nothing in the act of 1893, which gives her a contracting power, that denies or restrains her right to contract with her husband. The second section of the act (P. L. 344, Act June 8, 1893) provides that "hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section" (section 1), but she may not become accommodation indorser, nor execute a deed without joining her husband. Here is a very large contracting power conferred, with only special restrictions, which do not embrace the pending question. Within her limitations, a married woman may contract to the same extent, and in the same manner, as an unmarried person. The first section defines the subjects of her contracting power thus: "that hereafter a married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell or otherwise dispose of any property real, personal or mixed, and either in possession or expectancy," etc. The word "earnings" does not appear in this act; but, as personal services are a species of personal property, it would seem they may be sold; and, as earnings represent in common speech the reward for such services, whether in money or chattels, it would seem that they may be "acquired" or "owned" or "possessed," within the fair meaning of the section. In *Re Lewis' Estate*, 156 Pa. 337, 27 Atl. 35, we held that, under the act of 1887, the earnings of a married woman were a species of property, and belonged to her and not to her husband; and we all agreed that she should have them where they were the reward of her personal service. Her title to them was absolute, and she could recover them in an action without joining her husband.

We do not think the act of 1893 was intended to restrain the meaning of the act of 1887, but to stand as a substitute for it, and with power and authority and contracting capacity of married women, at least equal to that which was conferred by the act of 1887. The word "acquire" in the act of 1893 we think includes every-

thing that would be included in the word "earned" in the act of 1887. A reading of the two acts together indicates clearly that the later one was intended to remove some doubts about the construction of the first, and to place the rights and powers of married women upon a broader, more comprehensive, and better-defined basis than was accomplished by the act of 1887. The title of the act of 1893 expressly states, as one of the objects of the act, the "enlarging her capacity to acquire and dispose of property." In the present case, everything that could be done was done by the husband to enable the wife by her own personal service to acquire for herself alone the reward of that service, and no rights of his independent of contract are in the way of her recovery. We agree with the learned court below in the views expressed upon this subject, and therefore affirm the decree. Decree affirmed, and appeal dismissed, at the cost of the appellants.

WILLIAMS and MITCHELL, JJ. We dissent from this judgment. If it be conceded that the alleged contract is good between the parties, it is not good as against the husband's creditors.

II. Wife's Personality in Possession²

JORDAN v. JORDAN.

(Supreme Judicial Court of Maine, 1864. 52 Me. 320.)

Assumpsit, for money had and received.

It appeared that the money in controversy was the money of the plaintiff before her marriage, in June, 1834, and was never reduced to possession by her husband during their marriage, but remained during that time under her sole control.

The defendant claimed the money as belonging to the estate.

The presiding judge instructed the jury that, if they believed from the testimony that the plaintiff retained possession and control of the money sued for during coverture till the husband's death, then the money remained her property.

The verdict was for the plaintiff and the defendant excepted.

APPLETON, C. J. By the common law, the personal property of the wife, which she had at the time of her marriage in her own right, such as money, goods and chattels, vests immediately and absolutely in the husband, who can dispose of them as he pleases.

² For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 49.

On his death, they go to his representatives, as being entirely his property. 2 Kent's Com. 135. "As to chattels personal, which the wife has in her own right, as ready money, jewels, household goods, and the like, the husband has therein an immediate and absolute property devolved to him by marriage, not potentially, but in fact, which never again can revest in the wife or her representatives." 2 Black. Com. 435. These doctrines of the common law have received the sanction of courts of the highest authority in this country. Burleigh v. Coffin, 22 N. H. 118; Wheeler v. Moore, 13 N. H. 478; Hyde v. Stone, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; Blanchard v. Blood, 2 Barb. (N. Y.) 353; Ames v. Chew, 5 Metc. (Mass.) 321; Washburn v. Hale, 10 Pick. (Mass.) 429; Savage v. King, 17 Me. 301.

The choses in action of the wife do not thus vest absolutely in the husband. He must reduce them to possession in the lifetime of the wife. If not so reduced to possession upon his death, they belong to the wife and not to the representatives of the husband.

The instructions given were at variance with the rules of the common law, which had not been modified by legislation in 1834, and were erroneous.

How far existing statutes may affect the rights of the parties is not now before us, either upon the instruction requested or those given. Exceptions sustained.

III. Wife's Choses in Action³

1. AT COMMON LAW

WELLS v. TYLER.

(Supreme Court of Judicature of New Hampshire, 1852. 25 N. H. 340.)

Assumpsit. It was agreed by the parties that judgment should be rendered for either party, as hereinafter specified, according to the opinion of the court upon the following statement of facts:

On the 24th day of March, 1851, John Spaulding, the defendant's testator, died, having made his will, in and by which he devised and bequeathed to his daughter, Mary Wells, wife of the plaintiff, as follows: "I give and bequeath to my daughter, Mary Wells, wife of Philander B. Wells, one thousand dollars, to be paid to her or her heirs at the decease of my wife; except my

³ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 50, 51.

wife shall think best to pay it, or cause it to be paid, or any part thereof, during her life time, to my said daughter. Also, twelve shares in the Lowell Bank, in Lowell, two shares in the Nashua Bank, at Nashua, one share in the Taylor's Falls Bridge Corporation, eight shares in the Vermont Central Railroad, three shares in the Passumpsic Railroad, and three shares in the Northern Railroad, to hold to her and her heirs forever."

At the time of the decease of said John Spaulding, the said Mary Wells, wife of the plaintiff, was living, and then was, and has ever since continued to be, an insane person. John Spaulding, at his decease, was the owner of the said shares, and the same have come into the hands of the defendant, as executor of his will. The plaintiff has duly demanded of the defendant the delivery and assignment to him of the shares, and the defendant has refused so to deliver and assign the same.

And it is agreed by the parties that all objections to the form of action and the sufficiency of the demand shall be waived, and that if the court shall be of opinion that the plaintiff is entitled to have and receive of the defendant an assignment and delivery of the shares by virtue of the provisions of the will, then judgment shall be rendered for the plaintiff for the sum of \$1,500, and costs; but if otherwise, then judgment to be rendered for the defendant, for his costs.

EASTMAN, J. The decision of this case lies within a very narrow compass. All exceptions to the form of the action and the sufficiency of the demand being waived by the agreement of the parties, the only questions presented for our consideration, arise upon the construction to be given to the will of Spaulding, and the rights of the husband of the legatee.

There is no suggestion that the event upon which the \$1,000 were to be paid to the wife of the plaintiff, has yet arrived; and there is no controversy between the parties in regard to that sum. The action is brought to recover only the shares in the several corporations.

The thousand dollars were dependent upon the life and decision of the testator's wife, but the shares he gave to his daughter, the plaintiff's wife, "to hold to her and her heirs forever." The bequest of the shares was absolute and unconditional, without restriction in any way whatever. They were not given to her, for her sole and separate use, free from the interference and control of her husband, but "to her and her heirs forever." They do not, therefore, come within the decision of *Judge of Probate v. Hardy*, 3 N. H. 147, and of *Pierce and Wife v. Dustin*, 24 N. H. 417. Nor are they affected by the provisions of the act of 1846.

A legacy to a wife does not vest absolutely in a husband. He has a right to reduce it to possession, or permit her to hold it

to her separate use. If he does not exercise his rights over it, it survives to her in case of his death. If he survives her, he is entitled to administration, and to recover and receive a legacy or a distributive share in which she is interested, to his own use. Parsons v. Parsons, 9 N. H. 309, 321, 32 Am. Dec. 362; Marston v. Carter and Trustee, 12 N. H. 159; Tucker v. Gordon, 5 N. H. 564.

And where a legacy is given in general terms to a wife, without restriction, the husband may reduce it to possession, or he may, for a valuable consideration, release or assign it by a deed to which she is not a party. Pierce and Wife v. Dustin, before cited.

These authorities settle the matter, and there must therefore be judgment for the plaintiff.

2. EFFECT OF MODERN STATUTES

JOHNSON v. JOHNSON'S COMMITTEE.

(Court of Appeals of Kentucky, 1906. 122 Ky. 13, 90 S. W. 964.)

Action by M. M. Johnson's committee against G. J. Johnson. Judgment for plaintiff, and defendant appeals.

PAYNTER, J. Appellant, G. J. Johnson, and Mary M. Johnson, were married in 1897. They lived together as man and wife until 1899, when Mrs. Johnson went to the state of Kansas, where she remained for a year, when she instituted a suit against appellant in a court of Kansas for divorce from the bonds of matrimony. An order seems to have been entered granting the divorce. The parties continued to live apart. There was some question as to the validity of the divorce granted by the Kansas court, and appellant instituted an action in the Jessamine circuit court against appellee for a divorce from the bonds of matrimony on the ground of abandonment. A judgment of divorce was entered. In the judgment a recitation was made as follows: "Both plaintiff and defendant are hereby restored to all property rights possessed by each of them before their marriage."

Subsequently this suit was instituted by appellee, Mary M. Johnson, against the appellant, to recover the possession of a note for \$800 and interest, and by an amended petition she asked that, in the event the note could not be recovered, she be given judgment against the appellant for the amount of the note and interest. Before the appellee left for Kansas she loaned a man by the name of Foster \$800, for which he executed a note to her. Subsequently

appellant surrendered to Foster the note which he had given to the wife, and had another note executed to himself by Foster for the \$800 in lieu of the surrendered note.

Appellant resists appellee's right to recover upon the grounds: (1) That the wife gave the note which Foster had executed to her to him for money which he had expended on her property, and for labor performed in looking after it for her; (2) that after the wife instituted the suit in Kansas for divorce he threatened to make a defense to the action, unless she confirmed the gift of the note previously made to him; and (3) that as he had disposed of the note which had been executed by Foster to her, and thus converted it to his own use before the judgment of divorce in the Jessamine circuit court, no cause of action exists in favor of appellee growing out of the transaction.

Appellant testifies that the note was given to him by her for the money expended and labor performed, as stated. The wife denies this transaction (the testimony of each was incompetent—*Buckel v. Smith's Adm'r*, 82 S. W. 235, 26 Ky. Law Rep. 494), and introduced some considerable testimony tending to show that appellant did not perform the labor nor expend the money on her property in Jessamine county, as claimed by him. We are of the opinion that he fails to establish that the note was given to him for the consideration claimed by him.

The court sustained a demurrer to that paragraph of defendant's answer in which he pleaded that she gave him the note to induce him not to interpose a defense to the action in Kansas. We are of opinion that the court did not err in sustaining the demurrer. The facts, as detailed, did not constitute a good consideration. Such an agreement was against public policy. From the averments in the pleading the gift was not, as a matter of fact, an adjustment of property rights, but simply an inducement to forbear to interpose a defense to the action for divorce, which, he states, would have prevented her from obtaining it.

It is urged by counsel for appellant that, if the transaction is against public policy, then the law will leave the parties where they were found; that equity will not relieve either party from such a transaction. The facts averred do not make a case for the application of that principle of equity. It was simply a void contract. If, at the time the contract was made, the appellee was entitled to recover the note or the amount of it, her cause of action was not destroyed by reason of that agreement. It being void, it left the parties with rights as fixed by law.

As we have said, it is insisted that, under the judgment of divorce in the Jessamine circuit court, it simply restored to the parties the property rights possessed by each of them before their marriage, and that the plaintiff is not entitled to recover the note or the amount of it. The language of the judgment does not con-

form to the requirements of section 425, Civ. Code Prac. That section reads as follows: "Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property, not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing." This section of the Code was enacted at a time when the husband was entitled to the personal property of his wife, providing he reduced it to his possession. Under this section of the Code, property was not to be restored which had been disposed of at the commencement of the action. Since the enactment of this section of the Code the Legislature has enacted statutes regulating the rights of husbands and wives in each other's property entirely different from the statute which was in force at the time of the adoption of the Code, from which we have quoted, section 425.

Section 2127, Ky. St. 1903, reads as follows: "Marriage shall give to the husband, during the life of the wife, no estate or interest in the wife's property, real or personal, owned at the time or acquired after the marriage. During the existence of the marriage relation the wife shall hold and own all her estate to her separate and exclusive use, and free from the debts, liabilities or control of her husband. No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability, upon a contract made after marriage, to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance; but her estate shall be liable for her debts and responsibilities contracted or incurred before marriage, and for such contracted after marriage, except as in this act provided." Under this section of the statute appellant would not have any interest in or control of the personal property of appellee, whether she owned it at the time of her marriage or after the marriage. The fact that he got possession of the \$800 note without valuable consideration would not have divested the appellee of her right to it. The mere reduction of it to his possession would not have given him any property rights in or to the note. Had she died while the husband had the note in possession, it would not for that reason have belonged to him. Had he refused to surrender it to her in her lifetime, she could, by appropriate action, have compelled him to do so. If the husband had not acquired the right to the note by contract, although the judgment for divorce had not provided

for the restoration of their respective property, still she could have maintained the action to recover the note or its value, if he had converted it to his own use. The mere fact that he disposed of the note before the judgment of divorce does not prevent appellee from recovering the note or its equivalent.

That provision of section 425 of the Code to the effect that property is not to be restored which had been previously disposed of is not operative as against the rights of the wife created and fixed by section 2127, Ky. St. 1903. So her right to maintain this action is independent of the judgment granting the appellant a divorce. It exists in virtue of section 2127, Ky. St. 1903. Although the court might have adjudged, under section 425 of the Code of Practice, that the appellant would not have been compelled to account to the appellee for the amount of the note, had he converted it to his own use previous to the commencement of the action for divorce, still, under section 2127, Ky. St. 1903, which must be read in connection with the Code section supra, this action can be maintained. In the case of *Price v. Price*, 78 S. W. 888, 25 Ky. Law Rep. 1804, this court held that a husband can become indebted to the wife under the act of 1894, and execute to her an enforceable obligation. This declaration was made in an action wherein the wife sought to recover from the husband the amount of the note which he had executed to her previous to the commencement of the action for divorce. The court based her right to recover upon the statute. The court did not allow her to recover simply because it was a note creating an obligation, but the recovery could have been had on any legal liability which the husband had incurred to the wife previous to the commencement of the action for divorce.

Judgment affirmed.

IV. Wife's Estates of Inheritance⁴

CLAPP v. INHABITANTS OF STOUGHTON.

(Supreme Judicial Court of Massachusetts, 1830. 10 Pick. 463.)

WILDE, J. The plaintiff claims as administrator of the estate of Ann Monk, and in her right as she was one of the heirs of Abigail Drake, who by the last will and testament of Lemuel Drake, her husband, was made the residuary devisee and legatee of his estate. A portion of his estate, real and personal, was given to the defendants upon a condition which has not been performed.

⁴ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 54.

In this portion of his estate a contingent interest vested in Abigail Drake, although the contingency upon which it depended did not happen until after her death. It was a vested right, subject to a contingency, which was transmissible to her heirs and representatives, and in them it became vested in possession on the forfeiture of the estate by the defendants. *Chauncy v. Graydon*, 2 Atk. 621; *Massey v. Hudson*, 2 Meriv. 133. After the death of Abigail Drake, the defendants' right became forfeited by their non-compliance with the condition, and the real estate has been recovered by her heirs. This action is now brought to recover Ann Monk's share of the personal estate or the legacy, and also of the profits of the real estate received by the defendants.

In regard to the legacy, the law is clear that it belongs to Abigail Drake's administrator, and consequently that no action will lie for it in the name of her heir. It has been said, and said truly, that the interest did not vest in Abigail Drake in possession. But it by no means follows that it was not transmissible to her representative, for it is sufficient for this purpose that the right vested. All contingent as well as absolute interests in personal property pass to the executor or administrator; and in like manner all choses in action pass, although they may remain depending on a contingency during the life of the testator or intestate. But if it were otherwise it would not give any right of action to the plaintiff. He claims in right of one of the heirs; but they had nothing to do with the personal estate or personal contracts of the intestate; and as heirs they could maintain no personal action in her right.

The claim for a share of the profits of the real estate depends on different principles, respecting which there are greater doubts. These profits all accrued after the death of Abigail Drake, and if Ann Monk had been unmarried at the time they accrued, this action might well lie. But it appears that at that time she was a feme covert, and the question is, whether the profits of her real estate during the marriage belonged absolutely to the husband, or as they were not actually reduced to possession by him, whether an action to recover them did not survive to the wife. It is somewhat surprising to find that this question does not appear to be entirely settled. There are conflicting opinions and decisions; and it would be but an unprofitable labor, I fear, to attempt to reconcile them. The better opinion seems to be, that these profits belonged absolutely to the husband; that he had a right to sue for them alone; and that no right of action survived to the wife. By the marriage the husband becomes the absolute owner of all the wife's personal property, and acquires a full and perfect title to the rents and profits of her real estate during the coverture. They are considered in law as one person, the husband being the head. The wife therefore, during the coverture, can make no contract to her own use, and if a note or bond is given to her, the prop-

erty in it immediately vests in the husband. *Barlow v. Bishop*, 1 East, 432. And she can acquire no personal property in her own right, for if she obtains any, by gift or otherwise, it becomes immediately the property of the husband, though not in his possession. *Com. Dig. Baron and Feme*, E, 3. The husband also has an absolute right to the services of his wife, and to all beneficial interests accruing thereby.

The right to recover compensation for such services vests in the husband alone, and does not survive to the wife on the death of the husband. In an action, however, the husband may join the wife, and if judgment is recovered in their names, and she survives, the judgment will survive to her. The recovery of judgment in such a case operates as a contingent gift from the husband to the wife, to take effect if she should survive. *Oglander v. Baston*, 1 Vern. 396. The same doctrine applies to the rents and profits of the wife's real estate, and to actions of trespass on her lands during the coverture. The husband may sue alone, or according to the current of the authorities, the wife may be joined. *Com. Dig. Baron and Feme*, W, X. But it by no means follows, that because she may be joined in an action, the cause of action will survive to her, if she is not joined, or no action is brought during the life of the husband. I think the true rule is, that in all cases where the cause of action by law survives to the wife, the husband and wife must join, and he cannot sue alone. This rule will go further than any other, to reconcile all the cases. In all actions for choses in action due to the wife before marriage, the husband and wife must join; and among all the conflicting cases, I apprehend not one can be found in which it was held that the husband could sue alone, where the cause of action would clearly survive to the wife. Now in the present case it might seem to me well settled, that the husband of Ann Monk might have maintained an action in his own name for the profits of the real estate received by the defendants. The profits belonged to him, and they were received to his use; so that the law implies a promise on their part to pay them over to him. But there was no promise, express or implied, to pay them over to the wife.

Plaintiff nonsuit.

ARNOLD v. LIMEBURGER. V

(Supreme Court of Georgia, 1905. 122 Ga. 72, 49 S. E. 812.)

On May 18, 1903, W. F. Arnold, F. M. Parrish, and Barney Arnold filed a petition for partition against W. J. Limeburger. The property described was two lots of land. It was alleged that W. F. Arnold was the owner of a seven-eighths of one-fourth undivided interest, F. M. Parrish the owner of a one-fourth undivided

interest, and Barney Arnold the owner of a one-eighth of one-fourth undivided interest, and that the defendant was the owner of the remaining one-half undivided interest. The defendant filed an answer, in which he denied that the plaintiffs had any interest in the land, and alleged that he was the sole owner of the same. At the trial the undisputed facts were as follows:

Joshua Limeburger died in possession of the land in controversy May 13, 1848. He left surviving him a widow, Salomy Limeburger, and seven children, to wit, Washington, the defendant, Woodbury, Louvinia, Seletie, Marion, Jasper, and Newton. The land was assigned to the widow about 1850 as dower, the record not disclosing the exact date. Louvinia married Arnold in 1849, but it does not appear distinctly whether the marriage took place before or after dower was assigned. Seletie married Parrish in 1857. On April 1, 1871, C. W. Arnold, the husband of Louvinia, and Wiley Parrish, the husband of Seletie, Woodbury Limeburger, and Salomy, widow of Joshua Limeburger, joined in a deed conveying the land in fee simple to W. J. Limeburger, the defendant, for an expressed consideration of \$1,800. Mrs. Arnold and Mrs. Parrish were not parties to this deed, but it appears that they knew of the execution of the deed either at the time or shortly thereafter. The widow of Joshua Limeburger died on December 31, 1886. Mrs. Arnold died September 1, 1888, and Mrs. Parrish is still living. Arnold is dead, but the record does not disclose the date of his death. The case was presented upon the theory that he died before his wife. Mrs. Arnold left, surviving her, eight children, and seven are still in life; the plaintiffs W. F. and Barney Arnold being among that number. Barney Arnold claims a one-eighth interest in the property as an heir of his mother. W. F. Arnold claims a seven-eighths interest—one-eighth as an heir of his mother, five-eighths under conveyances from other children, and one-eighth under a conveyance from James M. Dees and others, who are the children of a deceased daughter of Mrs. Arnold. F. M. Parrish claims under a deed from Mrs. Parrish. The deeds under which W. F. Arnold and F. M. Parrish claim were all executed in 1903. The court directed a verdict for the defendant, and the plaintiffs excepted.

COBB, J.⁵ The land in controversy was a part of the estate of the father of Mrs. Arnold and Mrs. Parrish. Their husbands had no interest therein except such as they acquired by virtue of their marital rights. The contest is between those claiming under the husbands and those claiming under the wives. The death of the father and the consummation of the marriages occurred before the Code was adopted. Upon the death of the father, each of the daughters became entitled to a one-seventh interest in his estate.

⁵ Part of the opinion is omitted and the statement of facts is rewritten.

Upon the death of the three brothers, each of them became entitled to a further interest in the property as heirs of their brothers. As one of the brothers died before the Code was adopted, and the other two after, the case, so far as it relates to the interest acquired from the father and one of the brothers, is to be determined by the law as it existed prior to the adoption of the Code, and as to the interest acquired from the other two brothers, as laid down in the Code. Prior to the adoption of the Code, the law of Georgia was that, so far as the marital rights of a husband were concerned, realty and personalty were upon the same footing, and that title to property of either class which was in possession of the wife at the time of the marriage immediately vested in the husband; but if the wife was not in possession, the marital rights of the husband did not attach, as against the wife's right of survivorship, and as against her heirs in case of her death, unless the husband had reduced the property to possession during his lifetime if she survived him, and during her lifetime if he survived her.

Under the Code of 1863 it seems that real estate owned by the wife at the time of the marriage vested immediately in the husband without reference to possession, but property acquired by the wife during coverture did not vest in the husband until reduced to possession by him. Code 1863, §§ 1701, 1702. It has been held that the husband's right to reduce to possession the property of the wife which had been acquired by her prior to 1866 was not affected by the passage of the married woman's act of that year, and that this right might be exercised thereafter. *Archer v. Guill*, 67 Ga. 195; *Grote v. Pace*, 71 Ga. 231 (2); *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211 (5). It will therefore be seen that, to determine the question whether the husbands had a right to convey the property in 1871, depended upon whether they had reduced to possession the interests of their wives in the property which they attempted to convey; the old law in reference to real estate owned by the wife at the time of the marriage, and the Code in reference to property acquired during coverture, each providing that the husband's right to convey the wife's property was dependent upon whether he had reduced it to possession. If the wife was at the time of the marriage in possession of the property, or if she acquired possession at any time during coverture, or if property which was acquired during coverture came into her possession, or property of either class came during coverture into the possession of the husband, then the same was reduced to possession, within the meaning of the law, and the husband had a right to convey it.

Both Mrs. Arnold and Mrs. Parrish were prior to their marriages actually upon the land, living with their mother, between the time of the death of their father and the time that dower was set apart; but this did not, in law, place them in possession of any interest in the land, their interest being simply a share in an un-

distributed estate. *Hooper v. Howell*, 50 Ga. 165; *Sterling v. Sims*, 72 Ga. 51. After the dower was set apart they were also upon the land, living with their mother; but they were not then in possession of any interest in the land, because the possession was in the mother as tenant in dower, and their actual presence upon the land would not put them in possession of the reversion, which could be reduced to possession only after the termination of the dower estate. So that under no view of the case could their presence upon the land, either before or after dower was set apart, be treated, in law, as a possession of any interest in the land. If the reversion had been sold during the existence of the dower estate, the right to the proceeds of the sale would have been a chose in action surviving to the wife, in the event her husband died before reducing the proceeds to possession. *Sterling v. Sims*, 72 Ga. 51.

The widow of Joshua Limeburger did not die until 1886, and the right of the daughters to take possession of their interests in the land did not accrue until that date. The record not disclosing anything which would establish a possession by the wives at the time of their marriages, or a possession acquired during coverture, the husbands had no right to convey the land in right of their wives in 1871, when the deed relied upon by the defendant was executed. *Hudgins v. Chupp*, 103 Ga. 484, 30 S. E. 301. In the elaborate opinion by Mr. Justice Little in the case just cited there will be found many of the cases decided by this court relating to this subject. In addition to those cases, see *Sayre v. Flournoy*, 3 Ga. 541; *Rogers v. Cunningham*, 51 Ga. 40. In *Smith v. Atwood*, 14 Ga. 402 (7), the court seems to have overlooked the act of 1785 which declared that the husband's marital rights should attach to land only under the same circumstances as they would attach to personal property; that is, only in the event the husband reduced the land to possession. * * *

V. Estates by the Entirety⁶

FROST v. FROST.

(Supreme Court of Missouri, 1906. 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689.)

Bill by Rachel L. Frost against Daniel B. Frost to establish a trust in lands alleged to have been purchased with joint funds. From a judgment for plaintiff, defendant appeals.

⁶ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 59.

VALLIANT, J.⁷ Plaintiff is the wife of defendant. There are two counts in her petition: In the first it is alleged that the plaintiff and defendant jointly owned certain land in Clinton county, each owning an undivided half, which they sold for \$3,000; that defendant collected and appropriated to his own use the whole sum; therefore plaintiff asks judgment for \$1,500, and interest. In the second count it is alleged that in 1888 plaintiff and defendant, being then husband and wife, and residing in Missouri, each owning "certain moneys" (how much each owned not stated), invested those moneys in certain real estate in Clinton county, "taking the title to said real estate in their names jointly, each owning an undivided half interest therein"; that in 1901 by their joint deed they sold the Clinton county land for \$3,000, all of which sum came into the possession of defendant, and with it he purchased 200 acres in Cass county at the price of \$6,000, paying therefor \$4,000 cash, and executing a deed of trust for the remaining \$2,000; that of the \$4,000 cash, \$3,000 was the proceeds of the Clinton county land, one-half of which plaintiff avers was her own separate estate; that at the time of the purchase of the Cass county land it was agreed between the plaintiff and defendant "that the deed should be made to plaintiff and defendant jointly, giving to each one his respective share or interest, in the same manner that the title to the real estate in said Clinton county was held," but that, in violation of that agreement, defendant, without the knowledge or consent of plaintiff, took the title in his own name, in consequence, by implication of law, a trust has resulted in plaintiff's favor. The prayer is that defendant be decreed to have taken the title, to the extent that her \$1,500 represent the purchase money in the land, in trust for her use. There was also a prayer for general relief. The answer was a general denial, except the admission that plaintiff and defendant were husband and wife.

The cause was tried by the court without a jury. There was a finding of the issues for the defendant on the first count, and judgment accordingly, from which there was no appeal; that count therefore is out of our way. On the second count the finding and judgment were for the plaintiff, the judgment being that the plaintiff recover of defendant \$1,400 and interest, viz., \$1,436.63, for which execution was awarded, and also that for satisfaction of the same the plaintiff should have a lien on the Cass county land. From that judgment, the defendant has appealed.

At the trial the plaintiff endeavored to prove that some of her money went into the purchase of the Clinton county land. Her proof on that point, however, was very vague and unsatisfactory. If she were here attacking the deed to the Clinton county land, seeking to reform it so as to establish a title by resulting trust

⁷ Part of the opinion is omitted.

in her favor on the ground that her husband used her money to purchase the land, her suit would fail, because her proof is not sufficient. But such is not the character of this suit; she is not attacking the Clinton county deed, and the defendant is not disputing its terms. Here the plaintiff comes alleging that she was the owner in fee as her separate statutory estate of an individual half of the Clinton county land, and relies on the deed conveying that land to her and her husband to prove that title. She says in her petition that, when that land was sold, it was agreed between her and her husband that the proceeds should be invested in the Cass county land, "and that the deed should be made to the plaintiff and defendant jointly, giving to each one his respective share or interest in the same manner that the title to the real estate in Clinton county was held." She stands on that Clinton county deed as it is, and avers that it gave her an undivided half of the land as her separate estate. But, when the deed was produced in evidence, it showed that the title was not as she alleged, but that it vested in her and her husband as an estate in entirety. Neither she nor her husband owned a half interest, they each owned the whole interest while both should live, and the survivor would have the whole when either should die. While they both lived in the marital relation she would have the equal enjoyment of the property with her husband, and, in that qualified sense, it might perhaps be said she had a half interest, but, in addition to that right, she had the contingent prospect of owning it all, and of that contingent right her husband could not deprive her.

Washburn, speaking of estates in entirety, says: "But, if the estate is conveyed to them originally as husband and wife, they are neither tenants in common nor properly joint tenants, though having the right of survivorship, but are what are called 'tenants by entirety.' While such estates have, like a joint tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest so as to affect the right of survivorship in the other. They are not seised, in the eye of the law, of moieties, but of entireties." 1 Washburn, R. P. (6th Ed.) p. 562. The common-law doctrine of estates in entirety is the law of this state. *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Bank v. Fry*, 168 Mo. 492, 68 S. W. 348. The text-writer last above quoted, on the same subject, adds that on the death of either the survivor does not acquire a new title, but holds only the same title which he or she took in the beginning, freed of the contingency. An estate in entirety is not a joint tenancy in which each holds an individual right. A joint tenant may destroy the joint tenancy and thereby destroy the right of survivorship by conveying his right to a third person, in which event his former co-tenant and the third person to whom the conveyance is made become, as to each other, tenants in common. But neither the hus-

band nor the wife in an estate of entirety can so destroy the character of the estate as to prevent the survivor becoming the sole owner. An estate in entirety is a peculiar common-law estate sometimes said to be founded on the common-law doctrine that the husband and wife are one. Perhaps it will not do to say that the estate rests entirely on that foundation, because sometimes we say that, when the reason for a certain law ceases, the law founded on the reason also ceases.

Modern legislation has done much to destroy the unity of husband and wife, yet, in spite of such legislation, it has been held in this state and elsewhere that estates in entirety remain as at common law. *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342; *Bank v. Fry*, 168 Mo. 492, 68 S. W. 348; *Wilson v. Frost*, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619; *Baker v. Stewart*, 40 Kan. 442, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213. Whilst estates in entirety originated in the common law and were, therefore, in harmony with the ancient theory that the husband and wife were one, yet that such estates did not arise as a necessity from that theory is shown by the fact that the common law also recognized that the husband and wife might become tenants in common. 1 *Washburn*, R. P. (6th Ed.) p. 562; 4 *Kent* (14th Ed.) p. 414. Therefore, the married woman's statutes, by dispelling the idea of the unity of husband and wife, do not abolish or alter the character of estates in entirety. * * *

Under the facts of the case at bar, it is not necessary for us to decide whether or not under our married woman's statutes the husband has been shorn of the exclusive right to the possession and control of the property held as an estate in entirety. It is sufficient to say, as we do say, that the title in such an estate is as it was at common law, neither husband nor wife has an interest in the property to the exclusion of the other. Each owns the whole while both live, and at the death of either the other continues to own the whole, freed from the claim of any one claiming under or through the deceased. Our married woman's statute, section 4340, Rev. St. 1899, after declaring what shall be her separate property says that it shall be "under her sole control." The lawmakers did not have estates in entirety in mind when they wrote that section. There are decisions of this court which say that, if a husband should invest his wife's money without her written consent in the purchase of land, taking the title in the names of himself and his wife so as to create an estate in entirety, she may, in a suit in equity, have a resulting trust declared in her favor, and the estate in entirety be set aside and the title vested in her or in a trustee for her use. *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261; *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. Rep. 486. But those decisions do not proceed on the

theory that the common-law estate in entirety has been abolished or altered in any respect. They proceed on exactly the same principle that would govern in a case where the husband, under like circumstances, had taken the title in his own name exclusively. It would be a fraud of the same character on the wife, if the husband should take a deed in the name of himself and her when it should have been taken in her name alone, as it would be if he had, under like circumstances, taken it in his own name alone. And, by the same principle, if the husband takes the proceeds of property that belonged to him and his wife in entirety and invests the same in other land taking the title to himself alone, a court of equity, at the suit of the wife, will raise a resulting trust in her favor, and decree that the husband holds the title in trust for his wife and himself as an estate in entirety.

The trial court erred, therefore, when it decided that one-half the proceeds of the Clinton county land, \$2,800 (which is the amount the court found was the proceeds of that land), belonged to the plaintiff as her separate property. None of it belonged to her as her separate property, and none of it belonged to her husband as his exclusive property, the whole sum belonged to them both as husband and wife as an estate in entirety, and, being so, the husband had no right to use it in the purchase of land taking the title in his own name, he should have taken the title, to the extent that that money purchased, in the joint names of himself and wife.

The evidence shows that the defendant invested the proceeds of the Clinton county land, \$2,800, together with \$3,700 of his own money, making in all \$6,500 in the Cass county land. To the extent that \$2,800 represents the purchase price of the land, the defendant was in duty bound to have taken the title in the name of himself and wife as an estate in entirety, and to that extent he will be decreed now to hold the title in trust. The judgment is reversed, and the cause remanded to the circuit court of Cass county, with directions to enter a judgment in plaintiff's favor decreeing that the title to an undivided $\frac{48}{100}$ of the Cass county land in question is vested in the plaintiff and defendant as husband and wife as an estate in entirety, and the title to the remaining undivided portion of the land is vested in the defendant, and that the plaintiff recover of defendant the costs in the circuit court.

The judgment so entered will relate back to the date of the filing of this suit in the circuit court, and will be an adjudication of the rights of the parties at that date. Whatever may have occurred since then to affect the rights of either party or both is not res adjudicata by the judgment in this case.⁸

⁸ See, also, *Hardenbergh v. Hardenbergh*, 10 N. J. Law, 42, 18 Am. Dec. 371 (1828); *Baker v. Stewart*, 40 Kan. 442, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213 (1888); *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762 (1895).

CONTRACTS, CONVEYANCES, ETC., AND QUASI CONTRACTUAL OBLIGATIONS

I. Contracts of Wife¹

FARRAR v. BESSEY.

(Supreme Court of Vermont, 1852. 24 Vt. 89.)

Book account. The action was commenced before a justice of the peace, and came to the county court by appeal. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows: The plaintiff's account was not disputed, but the defendants relied upon the statute of limitations, for defense. It appeared that two credits were made upon the plaintiff's books within six years, for services of the defendant's wife, and that the plaintiff and defendants agreed that the same should apply on the account against the wife of the defendant Bessey, contracted before her intermarriage with the said Bessey; that the plaintiff and defendants, before, or at the time the services were rendered, agreed that it should be applied in part payment of the account, as before stated. Upon these facts, the county court rendered judgment for the defendants upon the report. Exceptions by plaintiff.

ROYCE, C. J. This was an action of book account, brought to recover a balance claimed to be due from the wife. The whole of the plaintiff's account, except one item of fifty cents, on the debit side, and two items of credit, amounting to two dollars and fifty cents, accrued before the intermarriage of the defendants. They presented no account before the auditor, but relied on the statute of limitations. To this defense two answers were attempted before the auditor, but only one of them is now insisted on. This is based upon the fact, that the three items referred to accrued within six years before the commencement of the action. And these entries are found to have been justified by real transactions between the parties. But the report shows, that this part of the account accrued after the defendants had intermarried. When it accrued, the wife was no longer capable of contracting a debt against herself, nor was she entitled to claim the benefit of these credits, except as payments made by her husband upon her debt. In legal effect, this part of the account arose between the plaintiff and the husband alone; so that the account properly existing with the wife, was not brought

¹ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3 Ed.) § 61.

down to a time within the six years. *Gay et ux. v. Estate of Rogers*, 18 Vt. 342. It is found by the auditor, however, that the services of the wife, which constituted these two items of credit, were, by the express consent of both defendants, received to be applied in part payment of the previous account against the wife. They must have the application which was then intended. And the general rule is, that the admission of a debt by part payment, is sufficient to warrant the implication of a new promise to pay the unsatisfied balance. *Strong v. McConnel*, 5 Vt. 338. *Joslyn v. Smith*, 13 Vt. 353. *Munson v. Rice*, 18 Vt. 53 and *Sanderson v. Milton Stage Co.*, 18 Vt. 107.

But to authorize the implication of such new promise, from part payment, or other acknowledgment of a debt, the party whose promise is to be implied, must be legally capable of making a valid and binding express promise. And as a feme covert cannot make such a promise in her own right, especially while living with her husband, it follows that no effectual promise of the wife can be implied in the present case, from the fact of this part payment of her debt. This is a legitimate and obvious conclusion, from the doctrine held in *Pittam v. Foster et al.*, 8 C. L. R. 106. And we think it must be concluded, from the decision of this court in *Powers v. Southgate and wife*, 15 Vt. 471, 40 Am. Dec. 691, that no promise of the husband, which could affect the rights of his wife, under the statute of limitations, was to be implied from the payment made by him. The cause of action against the wife was therefore barred; and the present suit, founded on the assumption of her continuing liability, could not be sustained. The judgment of the county court is accordingly affirmed.

II. Conveyances, Sales, and Gifts by Wife ²

LANE v. SOULARD.

(Supreme Court of Illinois, 1853. 15 Ill. 123.)

The bill alleges: That Soulard conveyed certain property in St. Louis to trustees, to hold in trust for appellant, a married woman, provided she shall pay out of her separate estate, the sum of \$9,000, payable in four installments; that said Soulard agreed to complete the improvements then in progress, by the 1st October, 1846; that to secure the payment of the first installment

² For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 64-67.

more fully, being \$2,000, to be paid 1st October, 1846, the appellant and her then husband executed a deed of trust to a part of the defendants, as trustees for certain lands in Illinois, owned in her right, which authorized the sale of said lands, on the failure to pay said first installment, and out of the proceeds to pay, first, the cost, and then the sum of \$2,000; that upon the failure to pay any or all of the installments, or the interest, out of the separate estate of said Margaret B. Lane, the property in St. Louis should be sold for the payment thereof.

That said Soulard failed to complete said improvements in the time and according to his contract, and that, at the March term of the St. Louis circuit court in the year 1851, said Soulard obtained a decree for the sale of the property in St. Louis, under which decree said property was sold, and purchased by said Soulard for the sum of \$6,600; that said first installment formed a part of said decree, and that the proceeds of said sale ought to be applied to the discharge of said installment; that she was a married woman at the time of the execution of the deed of trust for lands in Illinois; that the consideration of the deed of trust had failed, and that it would not be just to allow Soulard to enforce the payment and still hold the property in St. Louis. The bill further charges that her land has been sold for taxes, and calls upon the court to require the trustees to proceed at law to recover said property, and to enjoin the sale until the title is settled. The answer admits the contract as set out by appellant, alleges that he has completed his contract, admits the proceedings in St. Louis, and sets up the decree in St. Louis as conclusive as to the amount due —to which there is a replication.

This cause was heard before Underwood, Judge, at August term, 1853, of the St. Clair Circuit Court.

CATON, J. Although many points were raised and ably argued in this case, we shall confine ourselves in the decision to one single question, which is unavoidably decisive of the whole case. The Revised Statutes repealed all the former laws on the subject of conveyances of real estate, and authorized married women within this state to convey their land by joining with their husbands and acknowledging the deeds in a specified way; but no authority was given for married women residing out of this state to convey their lands lying within it. The law thus continued till the act of the 22d of February, 1857, which authorizes married women without the state to convey their lands lying within this state.

In April, 1846, Mrs. Lane, with her husband, executed this deed of trust, in the city of St. Louis, where she then resided. The deed of trust conveys the premises in question to certain trustees, to secure the payment of certain moneys to Soulard. The question is, whether this was a valid conveyance of the premises. We shall

not stop to adduce authorities to show, that a feme covert cannot, except she be authorized by an express statute, convey her fee-simple title to real estate by deed. She is incapable of doing so at the common law, and hence there can be no law for it, unless it be by statute. Without a statute, she is incapable of conveying by deed as she is by word of mouth. From 1845 to 1847, there was no statute enabling married women without the state to convey their lands within it. This deed having been made without the authority of law, and against law, was simply void; as void as if it had been expressly prohibited by a positive statute. The second section of the law of 1847, provides that a feme covert not residing in this state, being above the age of eighteen years, may join her husband in the execution of deeds, etc., of lands lying within this state, and that she shall thereby be barred of her right in like manner as if she was sole, and the acknowledgment of such deed may be made in the same manner as if she was sole, and the section concludes: "And the provisions of this section shall apply to deeds, mortgages, conveyances, powers of attorney, and other writings, heretofore, as well as those which may hereafter be executed." The third section provides that such deeds, etc., which had been or might thereafter be executed without the state and within the United States, and acknowledged or proved in conformity to that statute, should be admitted to record, and read in evidence without further proof.

Admitting that here was the deliberate purpose on the part of the legislature, to give effect to conveyances made by married women out of the state, during the two years when they were not authorized to make such conveyances, and the question arises, Had they authority to make such deeds operative? We cannot bring our minds to entertain a doubt that the legislature had no such authority. Notwithstanding this deed of trust, Mrs. Lane was, on the 21st of February, 1847 as much the absolute owner of this land as if she had never made such a deed. That deed affected her right to it in no way whatever, any more than if it had continued a blank piece of paper, or her name had been forged to it by another, instead of being written by herself. She was no more authorized by law to put her name to that deed, so far as giving it effect was concerned, than a stranger had to write it for her. If the legislature could give effect to a deed thus executed against the provisions of the law, then they could make a deed at once which would convey the title. If they could by force of law make her title pass where none had passed before, then it is the law which passes the title and not the deed. It is the act of the legislature and not her own act, which deprives her of her land. If, on the 21st of February, she was the absolute owner of this land, unaffected, uninfluenced, unprejudiced by any thing which she had previously done or suffered, and on the 23d of February, she had

ceased to own it, by whose act had the title passed? Not by her own act, certainly, for she had done nothing in the mean time or previously, which could transfer the title. How then had it passed? By the act of the legislature alone. She had not done it, for she could not in any way, shape, or form, pass the title; but the legislature had taken her land from her and given it to others. This they are expressly prohibited from doing, by the constitution.

In support of the constitutionality of this law, we have been referred to several decisions in Pennsylvania, and in some other states, and in the Supreme Court of the United States. Nor is this the first time that our attention has been called to these cases. Without, at the present time, expressing any opinion upon the propriety of those decisions, it is sufficient to say, that they are upon cases not like this; but to sustain this law we should have to go further than any of these courts have gone, in sustaining legislative control over titles to real estate. Indeed, the protection intended to be secured by the constitution would be quite thrown down, and they would be left to dispose of the titles of individuals as they please. In those cases the law had authorized the parties to convey, but the conveyances had been imperfectly executed or acknowledged, and the curative laws had been passed to remedy such defects, and to confirm contracts which had been authorized by law to be made. Upon this ground all those decisions were made. But the case before us is quite different. Here, the law authorized no such contract whatever. In each of those cases there was an imperfect or defective execution of a power. Here is a total want of power. There, there was a capacity to act and an attempt made to exercise that capacity. Here was a total incapacity to act, and whatever was attempted to be done, was in direct violation of the law. Here, the party had attempted to do nothing which the law had authorized her to do. Here, there was no defect to remedy, but the entire act was void, not for the want of form, but for the want of power; and we are very clearly of opinion that the legislature could not give effect to a conveyance, which the law prohibited her from making, and thus transfer a title by the mere farce of a legislative act.

The decree of the circuit court must be reversed, and a decree entered in this court, enjoining the trustees named in the deed of trust from proceeding to sell under that deed. Decree reversed.³

³ Accord: *Higgins v. Crosby*, 40 Ill. 260 (1866); *Rogers v. Higgins*, 48 Ill. 211 (1868). Compare *Hoyt v. Swar*, 53 Ill. 134 (1870), and *Harrer v. Wallner*, 80 Ill. 197 (1875).

III. Contracts by Wife as Husband's Agent ⁴

FEINER v. BOYNTON.

(Supreme Court of New Jersey, 1905. 73 N. J. Law, 136, 62 Atl. 420.)

Action by Elizabeth Feiner and others against Harriet G. Boynton. There was judgment for plaintiffs, and defendant appeals.

GARRETSON, J. The plaintiffs recovered a judgment against the defendant in a district court for the value of goods furnished. The defendant is, and at the time the goods were furnished was, a married woman living with her husband. The goods furnished were for the personal use of the defendant. It appears from the state of the case that the husband provided the defendant with money from time to time for her household and personal expenses; that the account with the plaintiffs had always been in the defendant's name; that the defendant paid the bills, of which there were a large number, during the 11 years through which the account had been running, with her own checks, drawn upon a bank where her husband had deposited money for her, of which deposit the plaintiffs had no knowledge at all; that the plaintiffs had never had any dealings with her husband; that the husband deposited various sums of money, ranging from \$300 to \$700, in the People's Bank of East Orange, and that the defendant drew her own checks against said accounts to pay for the various household expenses, as well as for her clothing; that she had a separate estate.

There is no evidence to show that the defendant ever made any express contract with the plaintiffs which would bind her separate estate, and the only evidence from which a contract could be inferred was that the goods were charged to the defendant on the plaintiffs' books, and that the defendant paid the bills with her own checks; but there is nothing to show that the defendant knew that the goods were being charged to her by the plaintiffs, and the checks she gave in payment were of her husband's moneys, which had been deposited by her husband to pay for household expenses and her clothing. A debt incurred for the necessary clothing of a married woman is presumably the debt of the husband, and, if incurred by the wife, it is presumed she is acting as the agent of her husband, unless there is affirmative evidence to show that she intended to charge her separate estate. In Wilson v. Herbert, 41 N. J. Law, 461, 32 Am. Rep. 243, it is held: "When husband and wife are living together, and the wife purchases articles for do-

⁴ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 69, 70.

mestic use, the law imputes to her the character of an agent of her husband, and regards him as the principal debtor. She may contract for such articles as principal, and assume the responsibility of a principal debtor. But, to fix upon her a liability, it must affirmatively appear that she made the purchase on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment, exclusive of the liability of her husband."

The judgment of the district court is reversed.

BALL v. LOVETT.

(Supreme Court of New York, Appellate Term, 1906. 98 N. Y. Supp. 815.)

Action by Thomas R. Ball and others against George E. Lovett. From a judgment for plaintiffs, defendant appeals.

BISCHOFF, J. The goods in question were, in their character, such as would properly be described as necessaries for the defendant's children, and the testimony generally supported the inference that the station in life of the parties justified the purchase by the defendant's wife. While it appears that the defendant had left his home shortly before the period of these purchases, there was no overt separation, and the wife continued to reside in the home provided for her. Her agency to purchase the goods was supported by a course of dealing, apart from the strict relation of husband and wife, since the defendant had continuously paid bills rendered by the plaintiffs in the wife's name for similar purchases, and there was nothing to apprise the plaintiffs of any claim that the agency, apparently continuing, had been terminated. Again, since there was no open separation of the parties, the presumption of the wife's agency to pledge her husband's credit for necessaries still existed, and the defendant's evidence did not require the court to find that he had made sufficient provision for these particular needs, as against the inferences to be drawn from the other evidence in the case.

The judgment should be affirmed, with costs. All concur.

BERGH v. WARNER.

(Supreme Court of Minnesota, 1891. 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.)

Action by Christian C. Bergh against Lucien Warner for debts contracted by defendant's wife. Plaintiff appeals.

MICHELL, J.⁵ It is sought in this action to hold the defendant liable for debts contracted by his wife during coverture and cohab-

⁵ Part of the opinion is omitted.

itation. The first cause of action is for the price of a pair of diamond ear-rings, purchased by the wife for her own use; the second is for a small sum for repairing certain articles of her jewelry. The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent, and, as such, bind him. This agency is frequently spoken of as being of two kinds—First, that which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessaries which the husband himself has neglected or refused to furnish; second, that which arises from the authority of the husband, expressly or impliedly conferred, as in other cases. The first of these, sometimes called an "agency in law," or an "agency of necessity," is not, accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable although the necessaries were furnished to the wife against his express orders.

The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife, and supply her with necessaries suitable to her situation and his own circumstances and condition in life. But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature to the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril. If they attempt to hold the husband liable on this ground, the burden of proof is upon them to show—First, that the husband refused or neglected to provide a suitable support for his wife; and, second, that the articles furnished were necessaries. The term "necessaries," in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.

In regard to the much vexed question as to how it is to be determined, in a given case, whether the articles furnished were necessaries, the general rule adopted is that laid down by Chief Justice Shaw in *Davis v. Caldwell*, 12 *Cush.* (Mass.) 512, viz., that it is a question of fact for the jury, unless in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessaries. In this case the plaintiff utterly failed to establish a right to recover for the articles sued for in the first cause of action as "necessaries." Conceding, for the sake of argument, that, in view of the estate and rank of the defendant, the trial judge would have been justified in finding as a

fact that diamond ear-rings were necessaries; yet, so far from there being any evidence that the defendant neglected or refused to provide his wife a suitable support, it affirmatively appeared that he provided for her amply, and even liberally.

The only other ground upon which the defendant could be held liable was by proof that he expressly or impliedly authorized his wife to purchase the articles on his credit. This is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons. The ordinary rules as to actual and ostensible agency must be applied. The agency of the wife, if it exists, must be by virtue of the authorization of the husband, and this may, as in other cases, be express or implied. Her authority, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone. Of course, the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on other grounds of universal application. By having, without objection, permitted his wife to contract other bills of a similar nature on his credit, or by payment of such bills previously incurred, and thus impliedly recognizing her authority to contract them, a husband may have clothed his wife with an ostensible agency and apparent authority to contract the bill sued on, so as to render him liable, although she had no actual authority, just as any principal would be liable under like circumstances. It is also true that where the wife is living with her husband, she, as the head and manager of his household, is presumed to have authority from him to order on his credit such goods or services as, in the ordinary arrangement of her husband's household, are required for family use. *Flynn v. Messenger*, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279; *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. 308. This presumption is founded upon the well-known fact that, in modern society, almost universally, the wife, as the manager of the household, is clothed with authority thus to pledge her husband's credit for articles of ordinary household use.

But the articles sued for here are not of that character, and no such presumption would arise from the mere fact that the parties were living together as husband and wife. To hold the husband liable there must have been some affirmative proof of authority from him, either express, or implied from his acts and conduct. In this case there is an entire absence of any evidence of express authority. Indeed, the evidence tends quite strongly to show that it was his expressed wish that his wife would incur no

bills, and that his monthly allowance to her of "pin-money" was intended to avoid any occasion for her doing so. The evidence of acts and conduct on part of defendant tending to show that he had clothed his wife with apparent or ostensible authority to buy any such articles on his credit was exceedingly slight. The mere fact that he furnished his wife with expensive wearing apparel had little, if any, tendency to prove any such fact. The same may be said of the evidence that on one occasion he paid a dress-maker's bill of \$136, contracted by his wife, especially as there is no evidence that plaintiff had any knowledge of that fact. As to previous dealings between the parties, the only evidence is that on various occasions plaintiff had sold the wife articles of jewelry for cash, but on one occasion, nearly three years before, he had sold her on credit a bill of jewelry amounting to some \$19, the principal item of which was a pair of opera-glasses of the value of \$12, and that this bill was charged on plaintiff's books to the wife, but that the husband, about a year afterwards, paid it. We do not think that the evidence was such as to require a finding that the wife had authority to purchase the articles on the credit of the defendant. * * *

Upon the trial the defendant's counsel stated in open court that "defendant admits the items in the bill for repairs [the second cause of action], but disclaims any liability for the diamond earrings." This must be construed as an admission of the second cause of action. The trial court found against plaintiff on both causes of action. This was, of course, error. * * * The order appealed from is affirmed as to the first cause of action, and reversed as to the second, but without costs to either party.

CLOTHIER v. SIGLE.

(Supreme Court of New Jersey, 1906. 73 N. J. Law, 419, 63 Atl. 865.)

Action by Clarkson Clothier and others against Calvin R. Sigle. Judgment for plaintiffs. Defendant appeals.

FORT, J. The plaintiffs sue the defendant for necessaries furnished to his wife. That articles of wearing apparel and the like were furnished to her by the plaintiffs on her order and that they were such as were suitable for one in her station in life, was proven. The defense was that the defendant was not living with his wife at the time the articles were purchased, but that they were living in a state of separation, without his fault, and that the plaintiffs knew of that fact.

Where a wife is living separate and apart from her husband, as a result of his wrongful desertion, and he refuses to furnish her adequate means for her support, the law implies an agency in

her to purchase necessaries on the credit of the husband. But the proof of the fact that he is the deserter rests upon the plaintiff. *Vusler v. Cox*, 53 N. J. Law, 516, 519, 22 Atl. 347; *Hall v. Weir*, 1 Allen (Mass.) 261; *Dedenham v. Mellow*, 6 App. Cas. 24, 31; *Snover v. Blair*, 25 N. J. Law, 94; *Lockwood v. Thomas*, 12 Johns. (N. Y.) 248; *Mayhew v. Thayer*, 8 Gray (Mass.) 172-175.

The district court judge, before whom the case was tried without jury, found that the defendant had wrongfully deserted his wife and had refused, when requested by her, to supply her with money to furnish the necessities of life. There was evidence from which he could so find. This court will not review the district court on questions of fact. If there be evidence to justify the finding of that court, its judgment will be sustained. *Cosgrove v. Metropolitan Construction Co.*, 71 N. J. Law, 106, 58 Atl. 82; *McLaughlin v. Beck*, 71 N. J. Law, 380, 58 Atl. 1081.

It is contended by the defendant that the proof showed that the defendant had provided a home for his wife, in which he resided, and that she was bound to come to him there and be supported in it and that as she had failed to do so, this action would not lie. The proof seems to be clear that the defendant did own a dwelling house property, and he testified he was living in it, but there was not the slightest evidence, except his own statement, that he had ever requested his wife to come to it and live with him, or had ever offered to support her in the house. He left his wife over two years prior to the suit and had never visited her in the house from which he had deserted her, nor had he sought her to return to him, or advised her that he had a home to which she might come.

The judgment of the district court is affirmed.

STEINFIELD v. GIRRARD.

(Supreme Judicial Court of Maine, 1907. 103 Me. 151, 68 Atl. 630.)

Assumpsit by H. L. Steinfield against Henry Girrard to recover the price of certain merchandise, "in the nature of necessities," furnished by plaintiff to the wife of the defendant. The wife had not been living with her husband for some months prior to the purchase, and the plaintiff did not know at the time he furnished the merchandise to the wife that she and her husband had separated. Verdict for plaintiff for \$18.08. During the trial the defendant excepted to certain rulings made by the presiding justice.

KING, J. ⁶ Action of assumpsit to recover the price of certain merchandise furnished to the wife of defendant.

⁶ The statement of facts is rewritten.

Verdict for plaintiff. The case is before the law court on defendant's exceptions to the exclusion of testimony and certain instructions of the presiding justice.

It appeared in evidence that the wife had never before bought any goods of plaintiff on defendant's credit, that she had not been living with her husband for some few months prior to the purchase, but that the plaintiff was ignorant of the separation.

The defendant offered his own testimony to the effect that he was always willing and prepared to provide a home, and all necessities, for his wife, and that she was living apart from him on the date of the purchase of the goods sued for, without fault on his part. This testimony was excluded for the reason, as stated by the presiding justice, that, unless the plaintiff knew of the separation, the testimony offered would be immaterial. To that ruling the defendant excepted. We think that the exception must be sustained.

It was incumbent upon the plaintiff to establish the authority of the wife to bind the husband by the purchase of the goods. The only evidence relied upon for this purpose was the fact of marriage. It may be doubtful, if there is any presumption of agency on the part of the wife to pledge her husband's credit for necessities arising from the marriage contract alone, independent of the conjugal relation and cohabitation; but, if there is any such presumption, it is rebuttable, and may be disproved by the husband. *Baker v. Carter*, 83 Me. 132, 21 Atl. 834, 23 Am. St. Rep. 764.

The authority of a wife to pledge her husband's credit for necessities arising from the marital relation alone is only coexistent, and coextensive with her necessity occasioned by his failure to fulfill his duty in this respect. If his duty has been performed, or no longer continues, then no necessity can legally arise which would entitle the wife to such authority.

When a wife deserts her husband, without his fault, she forfeits all right to support and maintenance from him, and, a fortiori, in such case, she carries with her no authority to use his credit, even for necessities. *Peaks v. Mayhew*, 94 Me. 571, 48 Atl. 172.

The testimony offered in the case at bar was to the effect that the wife had in fact forfeited her right to support from the defendant by a willful violation of marital duty, a separation from him without his fault, and that he was willing and prepared to provide a home and all necessities for her. If true it would have established affirmatively a complete defense to the action. The defendant had a right to make this defense irrespective of the plaintiff's lack of knowledge of the separation.

The testimony offered should have been admitted. Its exclusion was prejudicial to the defendant, depriving him of the right to present facts which would disprove any liability on his part under

the action. For that reason this exception must be sustained, and a new trial granted.

The conclusion which we have reached that a new trial must be granted on account of the exclusion of the testimony offered by the defendant renders unnecessary a consideration of the other exceptions.

Exceptions sustained.

WIFE'S EQUITABLE AND STATUTORY SEPARATE ESTATE

I. Power to Dispose of Equitable Separate Estate¹

TURNER v. SHAW.

(Supreme Court of Missouri, 1888. 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319.)

Ejectment by Stephen J. Turner against Mary J. Shaw. The case was tried without a jury, and judgment was rendered for plaintiff, from which defendant appeals.

SHERWOOD, J.² Ejectment for an undivided one-sixth part of lots 519 and 520, in block 65, in the city of Louisiana, Pike county, Mo. The plaintiff and defendant are brother and sister, children and heirs at law of their father and mother, John F. and Sarah Ann Turner. The answer was a general denial, with a statement of special matters of defense set out at length, alleging that John F. Turner, deceased, the common source of title, being a Southern sympathizer, and alarmed at the condition of the country, in June, 1861, executed a deed of conveyance of the property in question to his wife, Sarah Ann Turner. This deed was recorded in 1865. John F. Turner, with his family, consisting of his said wife and two daughters, Mary J. Shaw and Sallie Turner, continued in the uninterrupted possession of the property up to the date of his death, in 1880. The wife died in 1882. The defendant, Mary J. Shaw, widowed sister of the plaintiff, was the housekeeper and general manager of the household from the time of the acquisition of the property, in 1852, until the death of her mother, Mrs. Sarah Ann Turner, in 1882. That on account of his fears for the safety of himself and property, and for the purpose of placing all his property in such a condition that his family might have full benefit of it in case of his death, or its confiscation, on June 5, 1861, in consideration of "love and respect" for his said wife, he conveyed to her all of his property, consisting of several tracts of land, together with the lots in question, which were occupied as his home-stead. In September, 1874, the wife, Sarah Ann Turner, in consideration of the sum of five dollars, etc., reconveyed the same property to her husband. In August, 1878, being advised that the last-named conveyance was ineffectual to reinvest him with the legal title to the property so as to enable him to make a proper dis-

¹ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 74.

² Part of the opinion is omitted.

position of his entire estate among his children, and especially to secure to his two daughters, aforesaid, the property in dispute, for a permanent home for them, he and his said wife executed a deed to the said Mary J. Shaw, by which they intended to convey all of his property, including these two lots. That, on the same day, Mary J. Shaw executed her deed to her father for the same property, following the description of the last-mentioned deed. In both of these conveyances, lots 519 and 520, in block 65, were omitted by the mistake of the scrivener. October 25, 1878, John F. Turner made his last will, devising these two lots to his said daughters, subject to the life-estate of his wife, Sarah Ann Turner. Sallie Turner afterwards conveyed her interest to her sister, Mary J. Shaw. * * *

This case was heard and determined solely upon the theory of the special defense set forth in the answer, that defendant was entitled to have the deeds of 1878 so reformed as to have included therein the lots in controversy. After an examination of the evidence, I am satisfied that it is not sufficient to warrant a decree for the reformation of those deeds. * * *

But there is another aspect in which this case is to be regarded—one which appears to have escaped the attention of both court and counsel. It is this: The deed from a husband to a wife, or from the latter to the former, are null in law; this arising from their being regarded as one person. Very differently, however, are they regarded in a court of equity. There they may sue and be sued, contract and be contracted with, become the debtor or creditor of each other, with like effect, so far as regards equitable contemplation and rights, as if they twain had never become one flesh. *Morrison v. Thistle*, 67 Mo. 596, and cases cited; 1 Bish. Mar. Wom. §§ 35, 37, 713, 717. The deed of 1861, from John F. Turner to his wife, while it did not vest in her a legal title to the lots in litigation, still passed to her an equitable estate.

And the estate thus created in the wife was an equitable separate estate. This is apparent for two reasons: (1) Because the language of the habendum of the deed last mentioned is, "to have and to hold unto the said Sarah Ann Turner, and to her sole use and benefit." *Morrison v. Thistle*, supra. (2) Because the deed was made directly from the husband to the wife. If the deed had been made by a stranger to the wife, then a separate estate in her would not have been created, absent the necessary words; but, being made to the wife by the husband, a separate estate, as against him, was the result. *Deming v. Williams*, 26 Conn. 226, 68 Am. Dec. 386; *Huber v. Huber*, 10 Ohio, 371; *Steel v. Steel*, 36 N. C. 452; *Maraman v. Maraman*, 4 Metc. (Ky.) 84; *McWilliams v. Ramsay*, 23 Ala. 813; 1 Bish. Mar. Wom. § 838.

It being, then, established that, in consequence of the deed of 1861, the wife became the owner of an equitable separate estate in

the land thereby conveyed, what was the effect of her deed, made back again to her husband in 1874? I can regard it as having but one effect, and that was to convey to him the same lands, that is, her equitable estate therein, which prior thereto she had been the recipient of from him. This must have been the effect of the deed of 1874, or else it had no effect at all. But it may be urged that this deed was utterly invalid because it was executed by the wife alone. However this may be as to mere statutory estates, which require a joinder of husband and wife in order to their valid execution, it will not hold as to separate estates in equity, which the wife may charge, mortgage, or convey without let or hinderance from her husband. With regard to such property, she is, in equity, a feme sole, and has the *jus disponendi*, which is the inseparable incident of ownership. By virtue of this, she charges, she incumbers, or she absolutely disposes of it, or she binds it by her parol agreements, just as any other owner would. This position is sustained by abundant authority, both here and elsewhere. *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 537; *Whitesides v. Cannon*, 23 Mo. 457; *King v. Mittalberger*, 50 Mo. 182; *McQuie v. Peay*, 58 Mo. 56; *Claflin v. Van Wagoner*, 32 Mo. 252; *Schafroth v. Ambs*, 46 Mo. 114; *Kimm v. Weippert*, 46 Mo. 532, 2 Am. Rep. 541; *Lincoln v. Rowe*, 51 Mo. 571; *De Baun v. Van Wagoner*, 56 Mo. 347; *Gay v. Ihm*, 69 Mo. 584; 1 Bish. Mar. Wom. § 853; 2 Bish. Mar. Wom. § 163; *Taylor v. Meads*, 34 Law J. Ch. 203. It is upon the idea that a feme covert possessed of a separate estate may convey it, that gave origin, in the conveyances creating such estates, to clauses against alienation. 1 Bish. Mar. Wom. § 844. Such clauses, the invention of Lord Thurlow, amount to a constant assertion of the power which the feme possesses but for such prohibitions. Those views are contrary to those expressed in *Martin v. Colburn*, 88 Mo. 229; but the opinion there was by a divided court; and, satisfied now that it was erroneous, we all agree to overrule that case.

The husband being the possessor of the legal estate in the lots in question, and having received from his wife all the equitable estate which, by his deed of 1861, he had conveyed to her, it results that, at the time he made his will, he had full power and ownership to dispose of the lots as he would; and that no reformation of the deeds of 1878 was necessary.

We reverse the judgment, and remand the cause, with directions to enter judgment for the defendant.

II. Power to Charge Equitable Separate Estate by Contract⁸

WEBSTER v. HELM.

(Supreme Court of Tennessee, 1894. 93 Tenn. 322, 24 S. W. 488.)

CALDWELL, J.⁴ De Helm purchased two cows from H. P. Webster at the price of \$160, for which he and his father and mother executed a promissory note, in the words and figures following: "\$160.00. Columbia, Tenn., Sept. 26, 1892. Six months after date we promise to pay to the order of H. P. Webster one hundred and sixty dollars, with interest from date; and the undersigned Ella Helm hereby binds and charges her separate estate, both real and personal, specially with the payment of this note. [Signed] De Helm. D. C. Helm, Security. Ella Helm, Security." Mrs. Ella Helm, the mother, then owned, and now owns, a life estate in a certain valuable house and lot in the town of Columbia, Tenn., the same having been devised to her by her father to her sole and separate use, without limitation or restriction upon her power of alienation. The note being past due and unpaid, H. P. Webster, for the use of Maury National Bank, to which he had transferred it as collateral security, filed the bill in this cause against Mrs. Ella Helm and her husband, to enforce its collection by a sale of her interest in said house and lot. The ground of the relief sought, as stated in the bill, is that Mrs. Helm, by the terms of the said note, specially bound and charged her separate estate with its payment. Mrs. Helm, answering with her husband, admitted the execution of the note, and her ownership of a separate estate, as herein stated; but she pleaded her coverture as a bar to any recovery against her personally, and denied that her agreement, in the face of the note, to bind and charge her separate estate, was of any force or validity, the note being, as to her, a mere surety obligation, assumed without any benefit to her or to her said estate. The chancellor adjudged the separate estate liable, and decreed that it be sold for the payment of the debt. Mrs. Helm appealed.

"The separate property of married women may be classified into the equitable and the statutory; the former being that recognized by courts of equity irrespective of statutes; the latter that recognized and created by those statutes which limit the common law rights of the husband in his wife's property, and which enlarge the rights of the wife." 22 Amer. & Eng. Enc. Law, 2, 3. In this state it is equitable, and not statutory. Therefore the separate

⁸ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 75-77.

⁴ Part of the opinion is omitted.

estate of Mrs. Helm belongs to the equitable class, and is subject alone to the rules applicable thereto; and what shall hereafter be said in this opinion will relate exclusively to that class without calling it by its distinctive name. With respect to the power of a married woman over her separate estate there has been great diversity of judicial opinion, both in England and in America. In one of the two principal classes of cases it has been held that she has no power of disposition, except that clearly given by the terms of the instrument creating the estate; while in the other the ruling has been that she has every power of disposition except such as may have been withheld expressly or by necessary implication. After some fluctuation, the latter is now the prevailing doctrine in Tennessee, as it is in England, where the wife's separate estate had its origin. 3 Pom. Eq. Jur. 1104; Adams Eq. *45; Young v. Young, 7 Cold. 461; Parker v. Parker, 4 Lea, 392; Lightfoot v. Bass, 8 Lea, 350; Grotenkemper v. Carver, 9 Lea, 281; Scobey v. Waters, 10 Lea, 563; Menees v. Johnson, 12 Lea, 563.

A person conveying or devising property to a married woman to her sole and separate use may give her full power of disposition by using affirmative words to that effect, or by mere silence. If, in the settlement, he says nothing on the subject, he is presumed to have intended that she be not limited or restrained in disposing of the property. A settlement without limitation or restriction, therefore, carries with it unlimited powers of disposition. Unlimited power of disposition, whether arising from express terms of the instrument creating the separate estate, or from the absence of restrictive words, includes unlimited power to charge. Williams v. Whitemore, 1 Tenn. Cas. 239; Steifel v. Clark, 9 Baxt. 470, 471. This seems as obvious as that the whole includes all of its parts. With unlimited power of disposition, the married woman may dispose of her separate estate for any purpose she may chose, for her own benefit or for the benefit of another person; and, since unlimited power of disposition includes unlimited power to charge, as the greater includes the lesser, she may likewise charge it with the payment of any debt or engagement she may make, whether as principal for her own benefit or that of her estate, or as surety for the benefit of another. This must be so, for if she can dispose of or charge her property for but one purpose, or for particular purposes only, then her power of disposition or to charge is not unlimited, but limited. To be unlimited, the power must include every disposition and every charge made with appropriate formality.

The validity of a married woman's sale of her separate estate depends—First, upon her power to make the sale; and, secondly, upon the mode in which it was made; not upon the purpose for which she disposed of the property, nor upon the use to which

she put the purchase money. The latter matters are important only when made so by the terms of the settlement. The same is true as to a charge upon her separate estate. Its validity depends upon her power to make the charge, and the manner in which it was done, rather than upon her relation to the debt as principal or as surety. If it be found in a given case that her power of disposition was unlimited, and that her deed or her charge has been made according to the forms of law, then a court of equity will enforce her contract according to its terms.

It is well settled in this state that a married woman owning a separate estate without limitation or restriction upon her power of alienation may charge that estate "with her contracts or engagements" by an express agreement to that effect. *Litton v. Baldwin*, 8 Humph. 210, 47 Am. Dec. 605; *Cherry v. Clements*, 10 Humph. 552; *Kirby v. Miller*, 4 Cold. 3; *Shacklett v. Polk*, 4 Heisk. 115; *Ragsdale v. Gossett*, 2 Lea, 736; *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. 511. That agreement is sufficient, and will be enforced in a court of equity, not as a lien, but as a mere charge, if contained in the face of a promissory note executed by the married woman (*Warren v. Freeman*, 85 Tenn. 513, 3 S. W. 513); or if in parol, the whole contract or engagement being in parol (*Eckerly v. McGhee*, 85 Tenn. 661, 4 S. W. 386). Privy examination is not essential to the efficacy of such an agreement. *Menees v. Johnson*, 12 Lea, 561. In England and some of the states the intention to make the charge may be inferred; here it must be distinctly expressed as a part of the contract. The will under which Mrs. Helm holds the property here in question imposed no limitation or restriction upon her power of disposition; hence, under the rule heretofore stated as now prevailing in this state, her power of disposition was unlimited. Having unlimited power of disposition, she also had, as an essential part of that power, unlimited authority to charge such property with any contract or engagement she might make, whether it be for her own advantage or merely as surety for her son; and, having exercised that authority in a legally recognized mode—that is, by an express agreement in the face of the note—the charge is valid, and should be enforced. That she owns only a life estate in the property, and not the fee, makes no difference. The charge is good to the extent of her interest. *Bullpin v. Clarke*, 17 Ves. 365; *Stead v. Nelson*, 2 Beav. 245; *Hulme v. Tenant*, 1 White & T. Lead. Cas. Eq. *481, and note.

Until now, this court has not held that a feme covert, without express authority to that end, may charge her separate estate with the payment of a debt, to which her relation is one of suretyship merely. Nevertheless, we think such is the plain logic and necessary result of the settled ruling that her power of disposition is unlimited when the instrument under which she claims the prop-

erty contains no limitation or restriction upon that power. In that sense, and to that extent, the cases establishing that rule are authority for the decision made in this case. * * * Affirmed.

III. Statutory Separate Estate⁵

SIDWAY v. NICHOL.

(Supreme Court of Arkansas, 1896. 62 Ark. 146, 34 S. W. 529.)

Action by S. B. Sidway, trustee, and others, against Nannie W. Nichol and Charles A. Nichol, her husband, on a promissory note and to foreclose a mortgage executed by defendants to secure said note. The complaint alleged that the consideration for the mortgage and note was money loaned to said Nannie W. Nichol. The answer of defendants did not deny that the money was loaned to Mrs. Nichol, but sets up the defense that neither she nor her husband had any interest in the estate that they could convey by mortgage. Both Mrs. Nichol and her husband died before the termination of the suit, and the cause was revived against M. W. Taggart, administrator of the estate of Mrs. Nichol, and William, Josiah, and Curran Nichol, her children and sole heirs. The court found that the title to the land in question was held in trust by M. W. Taggart for the use and benefit of Nannie W. Nichol, for the uses and purposes described in the will of her father, Willoughby Williams, and that neither she nor her husband nor the said trustee had power to execute the mortgage. The court rendered a judgment against the estate of Mrs. Nichol for the amount of the note and interest, but held that the mortgage was void, and refused to foreclose the same. Both parties appealed.

RIDDICK, J.⁶ * * * The second question is, did the court err in rendering judgment against the estate of Mrs. Nichol for the amount of the note executed by her? The complaint alleged that the consideration for the note was money loaned to Mrs. Nichol. As this allegation was not denied, we must take it as true; and the question presented is whether a married woman, under our law, has the right to borrow money for her own use and benefit, and whether or not she becomes personally liable for the payment of a note executed for such money. It has been frequently held by this court that a married woman may make a contract for the ben-

⁵ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 78.

⁶ Part of the opinion holding the mortgage void is omitted. The statement of facts is rewritten.

efit of herself or her separate estate, and that such contract will be enforced against her separate property. *Stowell v. Grider*, 48 Ark. 220, 2 S. W. 786; *Collins v. Underwood*, 33 Ark. 265; *Stillwell v. Adams*, 29 Ark. 346. This was the law before the passage of the statutes enabling married women to acquire and hold property in their own right, free from the control of their husbands, and without the aid of a court of equity. The promissory note of a married woman, given for money borrowed by her before the passage of the enabling statutes, would have been enforced in equity against her separate estate. *Dobbin v. Hubbard*, 17 Ark. 189, 65 Am. Dec. 425; *Miller v. Brown*, 47 Mo. 506, 4 Am. Rep. 345; *Bank v. Collins*, 75 Mo. 281; *Williams v. Urmston*, 35 Ohio St. 296, 35 Am. Rep. 611; *Davis v. Bank*, 5 Neb. 242, 25 Am. Rep. 484; 2 *Kent, Comm.* 151; *Lawson, Rights, Rem. & Prac.* § 749.

Such a contract, before the enabling statutes were passed, created no personal liability against her, for the reason that the separate property of married women, before the passage of such laws, was altogether a creation of a court of equity. By the common law she could make no contracts. The contracts of a married woman were void at law, and were not recognized by courts of law. Inasmuch as her creditors had no means, at law, of compelling the payment of her debts, the courts of equity, which had created her separate estate, took upon themselves to enforce her promises, not as personal liabilities, but by laying hold of her separate property, as the only means by which they could be satisfied. *Owens v. Dickenson, Craig & P.* 48, 54; *Pike v. Fitzgibbon*, 17 Ch. Div. 454; 3 *Pom. Eq. Jur.* § 1122, and cases cited. If the married woman had no separate estate, her creditors were without a remedy; for the proceedings to enforce her promises made in reference to her separate estate were not against her personally, but against her separate estate. It was a peculiar remedy, formulated by courts of equity to enforce promises which at law were void. *Ex parte Jones*, 12 Ch. Div. 484; 3 *Pom. Eq. Jur.* § 1122, and note.

While the law stood in this condition, our constitution was adopted, and statutes were enacted providing that property owned by a married woman at the time of her marriage, or acquired afterwards, should be and remain her sole and separate property; allowing her to bargain, sell, assign, and transfer such property, and to engage in trade or business on her own account; providing that no bargain or contract made by her in respect to her sole and separate property, business, or services shall be binding on her husband, or render him or his property in any way liable therefor, but that she may alone sue or be sued in the courts of this state on account of said separate property, business, or services; and further providing that any judgment against her may be enforced by execution against her sole and separate estate or property to the same extent and in the same manner as if she were sole. *Sand.*

& H. Dig. §§ 4945-4951. The object and effect of these statutes were to make a radical change in the law as regards the rights and powers of married women.

Every married woman of this state who acquired property after the passage of these laws became at once the owner of a separate estate. It is no longer an equitable estate, to be recognized alone by courts of equity; but it is, by virtue of the statute, a legal estate, recognized by courts of law as well as of equity. These laws do not give the wife power to contract generally. Her note given as surety for the debt of another would not bind her, or be enforced against her property. But they do give her power to contract in reference to her services, her separate estate, and in respect to a separate business carried on by her. The statute not only authorizes her to make such contracts, but expressly provides that she may alone sue or be sued in the courts of this state on account of such "property, business or services." Id. § 4946. It has been twice held by this court that under this statute the contracts of a married woman in relation to her separate business create a personal liability against her. *Hickey v. Thompson*, 52 Ark. 238, 12 S. W. 475; *Triebel v. Stover*, 30 Ark. 727. It follows, upon the same reasons, that a contract in reference to her separate property creates also a personal liability; for the statute intends such contracts—as much so as it does those concerning her separate business. "The right to contract," said Justice Schofield in *Haight v. McVeagh*, "is indispensable to the acquisition of earnings, and to the unrestricted possession, control, and enjoyment of property." *Haight v. McVeagh*, 69 Ill. 628; *Hickey v. Thompson*, *supra*.

The purpose of the statute was to permit married women to acquire and hold property without the intervention of a trustee or a court of equity. In order that she may be free to acquire property, it permits her to make contracts, binding upon herself, in regard to such property; and it provides that her husband shall not be liable upon such contracts, but that she alone may be sued thereon. So we think that, if this was a contract in reference to the separate property of Mrs. Nichol, it created a personal liability against her, and the judgment was proper. Imprisonment for debt having been abolished, the only effect of a personal judgment against a married woman is to render her property liable for its satisfaction.

Was this a contract in regard to the separate property of Mrs. Nichol? If a married woman who owns separate property binds that property to pay for other property which she buys, such property becomes a part of her separate estate. "If she has no separate estate," says Mr. Kelly in his work on Contracts of Married Women, "there has been considerable conflict on the question whether or not she can purchase on a credit, so as to create a separate estate; yet the true doctrine appears to be that a married

woman can purchase on credit, and the purchase will be her separate estate." Kelly, *Cont. Mar. Wom.* p. 160.

In a Michigan case the defendant, a married woman, was sued for the price of furniture purchased by her. Among other defenses, it was contended that the contract did not concern her separate property, and was therefore not within the statute. In an opinion delivered by Mr. Justice Cooley, he said: "The contract is for the acquisition of sole property, and the title to it, or at least a right in relation to it, vests when the contract is made. There is therefore no straining of terms in saying that the contract has relation to her sole property. The statutes on this subject establish a new system. * * * The rule which they establish is one of general capacity to own property, and to make valid contracts, binding in law and in equity, in relation to it; and I discover nothing in the statute which so limits that capacity as to prevent her making the first acquisition, any more than any subsequent one, on credit." *Tillman v. Shackleton*, 15 Mich. 456, 93 Am. Dec. 198. In the case of *Wilder v. Richie*, 117 Mass. 382, it was held that a married woman may bind herself by agreements for the acquisition of property to her separate use, and that no distinction could be made between money and other personal property. In *Loan Ass'n v. Jones*, 32 S. C. 313, 10 S. E. 1079, the supreme court of South Carolina held that, when a married woman borrows money, it becomes at once a part of her separate estate, and that her contract to repay it is a contract with reference to her separate estate, which may be enforced against her.

Our conclusion is that a married woman has, under our law, the right to purchase personal property, or borrow money for her separate use, and that the property purchased or money borrowed becomes her separate property. Her contract to pay for the same is a contract in reference to her separate property, and creates a personal obligation, valid in law and in equity, and this without regard to whether she owned any additional property or not. *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *Arthur v. Caverly*, 98 Mich. 82, 56 N. W. 1102; *Russel v. Bank*, 39 Mich. 671, 33 Am. Rep. 444; *Johnson v. Sutherland*, 39 Mich. 579; *Gaynor v. Blewett*, 86 Wis. 401, 57 N. W. 44; *Carriage Co. v. Pier*, 74 Wis. 585, 43 N. W. 502; *Houghton v. Milburn*, 54 Wis. 564, 11 N. W. 517, 12 N. W. 23; *Conway v. Smith*, 13 Wis. 125; *Haight v. McVeagh*, 69 Ill. 625; *Cookson v. Toole*, 59 Ill. 515; *Orr v. Bornstein*, 124 Pa. 311, 16 Atl. 878; *Institution v. Luhn*, 34 S. C. 184, 13 S. E. 357. To hold otherwise would be to say that, although the statute gives a married woman the right to acquire and hold property, yet, that if she undertakes to acquire it by contract, the law will treat such contract as of no validity.

Under that view of the statutes, a married woman who had no separate estate could make no valid contract for the acquisition

of property, however desirable and beneficial the ownership of it might be to her. If she was a seamstress, and needed a sewing machine, or a music teacher, and needed a piano, she could make no contract for a purchase upon credit. If she borrowed money with which to purchase property, her note given for the money would be void. This was her condition before the passage of the enabling acts. Such a construction, it seems to us, would, to a large extent, nullify the statutes which were intended to emancipate married women from many of the trammels of the common law; and permit them to contract for, acquire, and hold property. We therefore hold that a married woman has the right to acquire ~~money or other property by contract~~, and that her contract for the payment of money borrowed or property purchased is as valid and binding upon her as if she were a feme sole.

We have not overlooked the case of *Walker v. Jessup*, 43 Ark. 167, and other cases by this court holding that a married woman cannot make an executory contract of the purchase or conveyance of land, binding upon her or her heirs. There may be reasons why the executory contracts of a married woman in respect to real estate should not be enforced against her. That question is not before us, and we do not overrule those cases. But so far as the former decisions of this court may have intimated that the contracts of a married woman in respect to her separate property, and for its benefit, though valid and binding upon her in equity, create no personal obligation on her part, and can only be enforced by a proceeding in a court of equity against her separate property, the same are overruled.

The decree of the circuit court is affirmed. Motion for rehearing overruled.⁷

IV. Power to Dispose of Statutory Separate Estate⁸

HARRIS v. SPENCER.

(Supreme Court of Errors of Connecticut, 1898. 71 Conn. 233, 41 Atl. 773.)

Bill by Thomas Harris against Emma E. Spencer. There was a decree for defendant, and plaintiff appeals.

ANDREWS, C. J. The plaintiff set forth in the complaint that his intestate, who was his wife, in her lifetime owned eight shares of

⁷ Accord: *Scottish Co. v. Deas*, 35 S. C. 42, 14 S. E. 486, 28 Am. St. Rep. 832 (1892). See, also, *Kriz v. Peege*, 119 Wis. 105, 95 N. W. 108 (1903), holding that a married woman may acquire a leasehold by purchase and be liable for rent, though she has no business or separate estate other than that purchase.

⁸ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 70.

a certain stock worth \$2,000; that shortly before her death she transferred said shares by a transfer apparently absolute, to the defendant; that his said wife "did not make such transfer of her own free choice and will, but in consequence of the unlawful and fraudulent and deceitful acts and inducements exercised upon and towards her by the defendant." This transfer was made on the 2d day of August, 1897. Mrs. Harris died on the 28th day of September next following. In his prayer for relief "the plaintiff claims by way of equitable relief that said transfer of stock so obtained by the defendant from the said Cora Harris may be set aside, and declared null and void, and that title thereto may be vested in the plaintiff, as administrator on the estate of the said Cora Harris."

The plaintiff, as the administrator of Cora Harris, takes the title to, and is entitled to have the possession of, all the personal property of which she was the owner at the time of her death. If Cora Harris was, on the day of her death, the owner of the said shares of stock, then the plaintiff is entitled to have this prayer for relief granted; otherwise not. The question may be stated in this way: Did Mrs. Harris, on the last day of her life, have such a right to these shares of stock that she might have maintained a suit therefor against the present defendant? Stated in this way, the answer comes from the finding. The trial court has found that the transfer of the said shares was an absolute gift by Mrs. Harris to the defendant, perfected by the change of possession; and that it was without fraud, illegality, or undue influence. This finding is decisive. Mrs. Harris could not, at any time in her life, after making that gift, have maintained a suit therefor against the defendant. It is clear that as administrator the plaintiff shows no ground for a decree in his favor. As respects him, a title by gift in the defendant is not distinguishable from a title by purchase for a valuable consideration. Camp's Appeal, 36 Conn. 92, 4 Am. Rep. 39. See, also, Gilligan v. Lord, 51 Conn. 562.

This case has been argued here (it seems to have been tried in the court below) as though the plaintiff was seeking to recover, not as administrator, but in his own right as husband. The plaintiff and his wife were married on the 3d day of March, 1897. The claim of the plaintiff in this behalf is that, as by Gen. St. § 623, he would be entitled to an interest in the property which his wife might leave at her death, she could not, by a voluntary gift of all her property in her lifetime, deprive him of that interest. This claim cannot be sustained. These shares of stock belonged to Mrs. Harris at the time of her marriage to this plaintiff. Another part of the same statute (now section 2796) provides that as to all property held by a woman at the time of her marriage "she shall have power to make contracts with third persons and to convey to them her real and personal estate as if unmarried." If, being an unmarried woman, Mrs. Harris had power to make

the gift which she made to the defendant, so that it would have been a valid and binding one, being a married woman, her power to make the gift is no less; the gift is equally valid and binding on her and her estate. The language of the statute gives her such power. Comstock's Appeal, 55 Conn. 214, 10 Atl. 559; Spitz's Appeal, 56 Conn. 184, 14 Atl. 776, 7 Am. St. Rep. 303.

The fact that the plaintiff and his wife were married since 1877, and that, outliving his wife, he would be entitled to a portion of her estate under the statute of that year, is clearly immaterial. That statute gives to a surviving husband a share of the property owned by his wife at her decease. It does not prevent the wife, during her life, from disposing of her property in any lawful way that she pleases, or incumbering it by any lawful agreement. Crofut v. Layton, 68 Conn. 100, 35 Atl. 783. Since the statute of 1877 a married woman has at law, over all her property during her life, the same power that she had prior to that statute, in equity, over her sole and separate estate—complete dominion. Imlay v. Huntington, 20 Conn. 175, citing Jaques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447; Story, Eq. § 1390. Mrs. Harris owed no debt or duty to the plaintiff in respect to these shares of stock, and she might do with them whatsoever was her pleasure. Ullrich v. Ullrich, 68 Conn. 580, 37 Atl. 393.

There is no error. The other judges concurred.

WICKER v. DURR.

(Supreme Court of Pennsylvania, 1909. 225 Pa. 305, 74 Atl. 64.)

Action by John H. Wicker and others against Henry Gustave Durr and George Chadams. Judgment for plaintiffs, and defendants appeal. The record disclosed that the land in question was conveyed to Anna M. Davis. Subsequently she married Ferdinand Durr, and thereafter she executed, sealed, and delivered a deed to him for the property which he placed of record. Ferdinand Durr died and devised the property to Henry Gustave Durr; Anna M. Durr died intestate leaving the plaintiffs as her heirs at law.

PER CURIAM. The only question raised by the appeal is whether a married woman can make a valid conveyance of her separate real estate by deed to her husband as grantee, which she alone signs, seals, and acknowledges, but which he accepts and places upon record. It has been uniformly held that a married woman has no power to convey her real estate except in the precise mode prescribed by the statute conferring the power. Her power to convey is conferred by the statute, and the mode pointed out by it is imperative. Trimmer v. Heagy, 16 Pa. 484. Neither the act of April 11, 1848 (P. L. 536), nor the act of June 8, 1893 (P. L. 344), changed

the provisions of the act of February 24, 1770 (1 Smith's Laws, p. 307), requiring a husband to join in the conveyance of a wife's real estate. The acts of 1848 and 1893 materially enlarged a married woman's control of her separate estate, but they left undisturbed the mode of its exercise in the conveyance of her real estate. The latter act expressly preserved it by the provision that "she may not mortgage or convey her real property unless her husband joins in such mortgage or conveyance." *Bingler v. Bowman*, 194 Pa. 210, 45 Atl. 80.

The judgment is affirmed.

V. Power to Charge Statutory Separate Estate by Contract⁹

DETROIT CHAMBER OF COMMERCE v. GOODMAN.

(Supreme Court of Michigan, 1896. 110 Mich. 498, 68 N. W. 295, 35 L. R. A. 96.)

MOORE, J.¹⁰ The plaintiff sued the defendant to recover for an amount due on a subscription reading as follows: "Detroit, Mich., 1892. We, the undersigned, being desirous of locating the new Chamber of Commerce Building on the northeast corner of State and Griswold streets, where the directors of said association have agreed to purchase a site 88x100, if it can be had for \$60,000.00, to provide for the difference between that amount and the cost of the property, viz. \$118,000, hereby agree to pay to the treasurer of the Chamber of Commerce Association the sum set opposite our names upon the following conditions and in the following manner." Then follow the conditions and list of subscribers. The subscription was not paid. The plaintiff sued the defendant, and obtained judgment. The defendant appeals. * * *

The only important question upon the record is, was it competent for Mrs. Goodman to make this subscription? When it was made she was a married woman, who owned the Griswold House, worth, with the real estate, about \$100,000. This property was about a block away from the proposed Chamber of Commerce site. The plaintiff claims that defendant's subscription, with others, was the moving cause of their purchasing the site. That it was believed by the defendant that, if the old livery stable occupying the site was torn away, and a fine building erected thereon, it would increase the value of defendant's property many times more than

⁹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 80-82.

¹⁰ Part of the opinion of Moore, J., is omitted.

the amount of her subscription, and for that reason the subscription was made by her. It is also argued that the erection of the Chamber of Commerce Building did increase the value of her property, that her separate estate was benefited, and that she is not under disability under the statute. On the part of the defendant it is claimed that under the common law she could not make this contract, and that the married woman's act (How. Ann. St. § 6295) does not allow her to make such a contract. It is claimed that she may contract, sell, transfer, convey, devise, or bequeath her real and personal estate, and cannot do more; that her power is not general, but statutory; that possible incidental benefits cannot support a contract made by her—citing Russel v. Bank, 39 Mich. 674, 33 Am. Rep. 444; Powers v. Russell, 26 Mich. 179; Emery v. Lord, 26 Mich. 431; West v. Laraway, 28 Mich. 464; Johnson v. Sutherland, 39 Mich. 579.

The relations of husband and wife towards each other and their property rights under the common law are very exhaustively discussed in the case of Tong v. Marvin, 15 Mich. 60. Justice Cooley also gives an interesting history in this case of the early legislation in this state in relation to the rights of married women, by which it was made to appear that the purpose of this legislation was to preserve to the wife all her rights in her own property, with as full power of control and disposition as if she had remained unmarried. It has been uniformly held by this court that our statutes do not authorize a married woman to become personally liable on an executory promise, except concerning her estate already possessed, or referring to it, or in relation to the property to be acquired by the contract, or in consideration of it. A note given for any other consideration is void (Insurance Co. v. McClellan, 43 Mich. 564, 6 N. W. 88), and unless the consideration for this subscription relates to her separate estate already owned by her, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it, it would be void. On the other hand, if the consideration of this subscription was that the estate which she then possessed was to be increased in value, and if, as a result of what was done, her estate in fact was increased in value, would it not be a sufficient consideration for the contract, and make it valid?

In Tillman v. Shackleton, 15 Mich. 447, 93 Am. Dec. 198, it was held that, where a married woman keeps a boarding house with the consent of her husband, and controls the entire business, contracts of purchase made by her for the purposes of the business must be considered as contracts in relation to her sole property, and therefore binding upon her. In Campbell v. White, 22 Mich. 185, it was held that a married woman residing with her husband, and owning a separate estate, could be held liable for the merchandise purchased by her on her individual credit,

though the merchandise was family necessaries, and was actually used by the husband's family, and in his household. Her liability was not contingent upon her ownership of other separate estates, or on the character of the goods bought, or their disposition. It depended on the fact that the property was obtained upon her credit. Her promise to pay for the articles was an undertaking to pay for her separate property. In *Rankin v. West*, 25 Mich. 195, it was held that a married woman could carry on a meat market in her own name, and that an agreement to pay for stock furnished to supply the market was valid, though the business was carried on by her husband acting as agent. In *Hirshfield v. Waldron*, 83 Mich. 116, 47 N. W. 239, it was held that a married woman living with her husband is liable for the price of clothing purchased by her for a minor son, and charged to her by her direction, she agreeing to pay for the same.

These decisions seem to be put upon the ground that the sale of the property was the consideration for her promise, and made her liable under the statute. The purchase of the goods by her made them her separate property. The use made of them afterwards was not material. * * *

In *Gillespie v. Beecher*, 94 Mich. 374, 54 N. W. 167, it was said: "The married woman's act was passed for the protection of married women. It was intended as a shield, and not as a sword. Its purpose was to enlarge her rights, and not to contract them; and certainly it was not meant to deprive her of the right, either acting alone or joining with others, of protecting her interests in property, either real or personal."

I think the doctrine to be gathered from these cases is that, if the debt or obligation made by a married woman is incurred on account of her own separate property, or if the agreement was concerning property then owned by her or to be acquired by her in consideration of the contract or agreement, she would be liable. Would the subscription sued upon come within either of those conditions? If this had been a contract to increase the value of her property by making improvements upon it, there could not be any question of her liability. If her purpose in making this subscription was to increase the value of her property by having improvements made in its immediate vicinity, which would not be made unless the subscription was made, I think it becomes a contract concerning her separate property; and if, as a result of her subscription, substantial improvements are made which increase the value of her property, she does, in fact, acquire property as a consideration for her subscription, and she would be liable upon it. * * *

GRANT, J., concurred with MOORE, J.

MONTGOMERY, J. I agree fully with my Brother MOORE that the enlarged powers of a married woman, under the married woman's

act (section 6295, How. Ann. St.), include the right not only to dispose of property already acquired, but to make contracts for the acquisition of property, and contracts directly relating to property owned by her. But I am not able to agree that an executory contract made by a married woman, by which she agrees to donate money for any enterprise, public or private, which may incidentally benefit her property, is enforceable. The statute reads that "the real estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance or devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner, and with a like effect, as if she were unmarried." The statute does not intend to remove all the common-law disabilities resting upon married women. The design was to confer upon a wife the right to enjoy and dispose of her own property, and to acquire property, and the statute should not be extended by construction to cases not embraced in its language, nor within its design. See *De Vries v. Conklin*, 22 Mich. 259.

Such an engagement as that involved in this case is not one by which the wife conveys or grants her property, nor is it one by which she acquires property by gift, grant, inheritance, or in any other manner. The most that can be said is that an incidental benefit may result to property which she already owns. In *Russel v. Bank*, 39 Mich. 671, 33 Am. Rep. 444, it was said by Mr. Justice Cooley: "The test of competency to make the contract is to be found in this; that it does or does not deal with the woman's individual estate. Possible incidental benefits cannot support it." It is true that case was a case involving suretyship, but it is no more true in this case than in that that by the contract engagement the married woman acquires property, and in that case as well as this there was the contention and the fact of incidental benefit to the married woman to result from the engagement. I think the reasoning of that case not inapplicable, and, basing my conclusion upon the statute itself, I am convinced that this undertaking is not within the power conferred upon married women by the act.

The judgment will be reversed, with costs, and no new trial granted.

LONG, C. J., and HOOKER, J., concurred with MONTGOMERY, J.

KUHN v. OGILVIE.

(Supreme Court of Pennsylvania, 1896. 178 Pa. 303, 35 Atl. 957.)

Scire facias by Henry H. Kuhn, trustee, against Ada J. Ogilvie, on a mortgage. From a judgment in favor of plaintiff, defendant appealed.

MITCHELL, J. A mortgage being in many respects treated as a mere security, though in form a conveyance, it might well have been held that a mortgage by a married woman to secure her husband's debt is in substance a contract of suretyship, which she was not, at common law, capable of making. But, on the other hand, she has, under the law of Pennsylvania, the right of every owner to convey her estate, subject to certain conditions as to mode, etc.; and, as she could sell or mortgage, and give the money immediately to her husband, there was no substantial reason why she should not subject her estate to a merely contingent liability for the same purpose. When the case of *Hoover v. Samaritan Soc.*, 4 Whart. 445, came before this court, the latter argument prevailed, and it was held that a married woman could use a power of appointment to execute a mortgage as collateral to her husband's bond for money loaned to him. This view has been steadfastly adhered to, and it is now the established rule that a married woman may mortgage her estate as security for her husband's debt, including future advances to him, or for the debt of any other person. *Hafey v. Carey*, 73 Pa. 431; *Hagenbuch v. Phillips*, 112 Pa. 284, 3 Atl. 788; *Bank v. Kuntz*, 175 Pa. 432, 34 Atl. 797.

This being settled, the only question left open in the present case is whether the rule has been changed by the act of June 8, 1893 (P. L. 344). It will be observed that the cases last cited were decided after the married woman's act of 1848, and it was held that the capacity of a married woman to mortgage her estate was not affected by that act, the purpose of which was to restrict the husband's power and that of his creditors, not that of the wife herself. The act of 1893 is a further step in the same direction, and, instead of contenting itself with restricting the power of the husband, it affirmatively enlarges the power of the wife. The first section provides for her control over her estate, including conveyance and mortgage of realty when her husband joins. The second section authorizes her to "make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section, but she may not become accommodation indorser, maker, guarantor or surety for another." It is upon this last clause that the argument for the appellant rests. It is clear, however, that this was a cautionary proviso against too liberal a construction of the very large powers conferred by

the first part of the section—a saving of the previously existing disability so far as it covered the particular class of contracts specified. The general intent of the act is so plainly in enlargement of her contractual capacity that nothing less than explicit negative words should be construed as narrowing powers admittedly possessed before the passage of the act.

The case of *Patrick v. Smith*, 165 Pa. 526, 30 Atl. 1044, arose under the act of 1887, and there is nothing in it in conflict with this view of the act of 1893. A wife indorsed her husband's note, which plaintiffs discounted and passed to her credit, and she immediately drew a check to her husband's order for the whole amount. At maturity the husband paid part of the note, and the wife gave her note for the balance, which plaintiffs discounted, and she again drew her check to her husband's order for the proceeds. On this note she was sued. It was held that her action throughout was for the accommodation of her husband, and that the statute could not be evaded by such a "transparent device," to which the plaintiffs were party. *Investment Co. v. Roop*, 132 Pa. 496, 19 Atl. 278, 7 L. R. A. 211, also arose under the act of 1887, and the strict construction given there probably had much influence in the passage of the act of 1893, which enlarged the grant of contractual capacity in express terms. Judgment affirmed.

EVANS v. FAIRCLOTH-BYRD MERCANTILE CO.

(Supreme Court of Alabama, 1910. 165 Ala. 176, 51 South. 785.)

Suit by the Faircloth-Byrd Mercantile Company against R. C. J. Evans and others to foreclose a mortgage. From a decree in favor of plaintiff, defendants appeal.

SIMPSON, J.¹¹ The bill by the appellee seeks to foreclose a mortgage, executed on January 4, 1908, by appellant M. A. Evans and her husband, one of the other appellants, and also prays that a mortgage executed by said respondents M. A. and R. C. J. Evans, on November 14, 1907, to the Citizens' Bank of Geneva, another respondent, be declared null and void as to the land conveyed by the mortgage to complainant, on the ground that said M. A. Evans, at the time of the execution of said mortgage, was a married woman, owning said property as a part of her separate estate under the laws of Alabama, and the same was given as security for her husband's debt. This appeal is from the decree overruling the demurrer to the bill.

The contention of the appellant is that no one can raise the point of the invalidity of a mortgage by a married woman, on the ground

¹¹ Part of the opinion is omitted.

stated, except herself. Our statute does not merely confer on the wife the right to plead her coverture to such conveyances, but provides that "the wife shall not, directly, or indirectly, become the surety for the husband." Code 1907, § 4497. If she is absolutely prohibited from making such an instrument, it necessarily follows that any attempt to do so is not merely voidable, but void. If so, it is difficult to see how her failure to take any steps to set aside the instrument, or even her ratification of it, could rise above the instrument itself and impart validity to it. This court has frequently declared all such attempts to be void. They were so declared, under the former statute, in the case of *Lansden v. Bone*, 90 Ala. 446, 8 South. 65, in favor of the heirs of the wife; the court saying: "To require them to show in their bill that the debt had been paid, or to aver a willingness to pay it, would be, in effect, to give validity to a mortgage of the wife's land, executed to secure the husband's debt, in the teeth of the very numerous decisions of this court * * * to the effect that such instruments are absolutely void as conveyances of the wife's land." In a later case, when it was first before this court, it was declared that the legal title passed by such mortgage (*Richardson v. Stephens*, 114 Ala. 238, 21 South. 949), leaving the wife only an equity; but on the second appeal that expression was corrected, and the court declared distinctly (calling attention to the wording of the former and present statutes) that the mortgage was absolutely void, and that "the mortgage, being void, conferred no rights upon the mortgagee." *Richardson v. Stephens*, 122 Ala. 306, 25 South. 39. * * *

Moreover, the execution of the mortgage to the complainant's assignor was a repudiation of the previous mortgage. It conveys the property with covenants of warranty as to the title and against incumbrances. The complainant, through its assignor being brought into privity with said M. A. Evans, by receiving such a deed from her, is entitled to all the interest which she had the power to convey in said land, and for the protection of its title has the right to raise the question of the invalidity of the previous mortgage, and to have the same declared in this proceeding, in order that, in the foreclosure sale, the entire land may be subjected to its mortgage. Story's Eq. Pl. (10th Ed.) § 193, and note "a," on page 194; 1 Jones on Mortgages (6th Ed.) § 1441; *Wells, Adm'r, v. Amer. Mortgage Co.*, 109 Ala. 431, 440, 20 South. 136; *Foster v. Johnson*, 44 Minn. 290, 292, 46 N. W. 350; *First Nat. Bank v. Salem Capital F. M. Co.* (C. C.) 31 Fed. 580, 583. * * *

We hold that the mortgage of M. A. Evans to the Citizens' Bank, if made as alleged, as surety for her husband's debt, was absolutely void, and conveyed no property, title, or interest to said mortgagee, and the junior mortgagee has a right to have it de-

clared void, in the interest of his title, to subject the land to the payment of his mortgage, free of any prior incumbrance.

There was no error in overruling the demurrers to the bill. The decree of the court is affirmed.¹²

IONA SAVINGS BANK v. BOYNTON.

(Supreme Court of New Hampshire, 1897. 69 N. H. 77, 39 Atl. 522.)

Assumpsit by the Iona Savings Bank against Mary E. Boynton on a promissory note. The note was signed by the defendant at the request of her husband, who told her he needed the money. She signed the note to help her husband in his business, and authorized him to secure its discount and dispose of the proceeds. The defendant's husband applied to the plaintiff for a loan of \$5,000, with 60 shares of the capital stock of the Tilton Hosiery Company as collateral. It declined to make the loan, but told him that, if his wife desired to borrow that amount with the same security, the loan would be made. Shortly afterwards he brought to the bank the note in suit, with the collateral above named, and received the amount of the plaintiff. He deposited the avails in the Citizens' National Bank to the credit of the Tilton Hosiery Company, of which he was treasurer. The defendant never met or had any talk with any officer of the bank relative to the loan. Upon the foregoing facts the court found a verdict for the plaintiff for the amount due on the note, and the defendant excepted.

WALLACE, J. The case discloses that the plaintiff refused to make the loan to the husband, but did make it to the wife alone, upon a note signed by her to which the husband was not a party, and that the hiring of the money by the defendant from the plaintiff was the independent contract of the wife as principal, and not as the surety or guarantor of the husband. The fact that she hired the money with the intention of letting her husband have it to assist him in his business, and did so let him have it, did not impair or suspend her legal capacity to make the contract, or make it an undertaking for him, or in his behalf, within the meaning of the statute. Parsons v. McLane, 64 N. H. 478, 13 Atl. 588; Jones v. Holt, 64 N. H. 546, 15 Atl. 214; Wells v. Foster, 64 N. H. 585, 15 Atl. 216. Exceptions overruled.¹³

¹² Accord: Allen v. Pierce, 163 Ala. 612, 50 South. 924, 136 Am. St. Rep. 92 (1909). See, also, Engler v. Acker, 106 Ind. 223, 6 N. E. 342 (1886).

¹³ The statute of New Hampshire (Pub. St. 1891, c. 176, § 2) provided that contracts of a married woman as surety or guarantor for her husband, or an undertaking for him or in his behalf, should not be binding on her.

Accord: Rood v. Wright, 124 Ga. 849, 53 S. E. 390 (1900); Rogers v. Shewmaker, 27 Ind. App. 631, 60 N. E. 462, 87 Am. St. Rep. 274 (1901).

ANTENUPTIAL AND POSTNUPTIAL SETTLEMENTS

I. Antenuptial Settlements¹

SPURLOCK v. BROWN.

(Supreme Court of Tennessee, 1892. 91 Tenn. 241, 18 S. W. 868.)

Suit by Margaret M. Spurlock against C. P. Brown and others to set aside a marriage contract. There was a decree for complainant, and defendants appeal.

DICKINSON, Special Judge.² On January 4, 1884, complainant was married to S. B. Spurlock. On December 24, 1883, after the parties became engaged, a marriage contract was executed by complainant, who was then Margaret Mallon, and Spurlock, by which he conveyed to her an estate for her life in a house and lot, and she agreed as follows: "And I, the said Margaret Mallon, contract and agree with the said S. B. Spurlock, in consideration of the above conveyance, upon the consummation of said marriage, to accept the above as my portion of his property, either real, personal, or mixed, moneys, choses in action, or accounts, and I do hereby relinquish all my rights of dower or homestead in any real estate said Spurlock now has, or may have; and, in case said Spurlock should die before I do, I hereby relinquish all and every interest in his estate I may or would be entitled to in consequence of said marriage."

Complainant had been in business, and had accumulated about \$3,700 which at the time this contract was made, and at the time of her marriage, was loaned to Spurlock. Nothing was said by the contracting parties in regard to this money, nor of the effect of the marriage upon it. On March 13, 1890, about a year before his death, he executed and gave to her his note for this money, with some interest, aggregating \$3,735.50, conditioned that it should not bear interest during his life. Spurlock died January 23, 1891, leaving no descendants. Respondents are his next of kin. His estate at his death was worth, net, about \$100,000. If there were no marriage contract, complainant, as sole distributee, and for dower, would succeed to an estate worth about \$50,000. * * *

Spurlock, at the time of the marriage, was about 63. Early misfortune had prematurely impaired his health, and caused him to

¹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 83-85.

² Part of the opinion is omitted.

withdraw from social life. He was a wholesale grocery merchant, and Mrs. Mallon was his customer. He knew her for years before her marriage, was familiar with her surroundings, and was her business adviser. It is in proof that he did not expect any children from the union. At the time the contract was made he was largely in debt, but his estate then was worth, net, fully as much as it was at his death.

There is an effort to show that complainant contrived the marriage, but the proof does not sustain it. * * * Her origin and antecedents were humble; but she, so far as this record shows, had achieved a competency for herself by her own efforts, and had maintained a reputable character. His antecedents and family position were good; but, constrained by a misfortune, he had banished himself from the social orbit in which he might have moved. His life was lonely, his health impaired, and he was approaching inevitable decrepitude. Leaving out all consideration of pecuniary benefits, there certainly was no advantage in his status over hers; nothing to make marriage a condescension on his part. * * *

The proof clearly shows that all question of the money he had borrowed of her was, on making the contract, passed over sub silentio. She surrendered all prospective marital rights in his estate, then worth, net, \$100,000, and received a life-estate, in realty, which had cost him, two months prior to the marriage, but \$5,000, and on which he had spent in improvements about \$1,000. She insists that a marriage contract, being cognizable only in a court of equity, will not be enforced unless the provision made for her be fair, reasonable, just, and equitable. It is contended for defendants that marriage alone is a sufficient consideration to sustain any antenuptial agreement the parties may make respecting present or future rights in the property of each other.

The authorities are much in conflict. One class of cases view the interposition of the contract as merely an equitable bar, which is held conclusive, provided it be entered into freely and understandingly. The other class treat the reliance on it as an invocation to the court for its active interposition to enforce it specifically, and inasmuch as specific performance is not an absolute right, but is always within the discretion of the court, they proceed to apply to the contract the usual tests to determine whether, under all the circumstances, the agreement is fair, just, and equitable, and especially whether the consideration be adequate. The methods of treating the contract would not produce such conflicting conclusions were it not for the high estimate put by one line of authorities upon marriage as a consideration, and its entire pretermission by the opposing line, which seem to look only to the pecuniary features of the transaction.

In *Naill v. Maurer*, 25 Md. 538, and *Forwood v. Forwood*, 86 Ky. 114, 5 S. W. 361, marriage alone is held to be a sufficient con-

sideration to sustain an antenuptial settlement. In the latter case the court says: "The consideration of marriage is not only regarded as sufficient to uphold an antenuptial contract, but the consideration may be regarded by the woman as of inestimable value to her—a value that would by far outweigh her property rights in the estate of her intended husband." The same rule, though not necessarily involved in the decisions, and therefore not authoritatively adopted, is approved in the following cases: McNutt v. McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Mann v. Mann, 53 Vt. 54; Hafer v. Hafer, 33 Kan. 460, 6 Pac. 537; Wentworth v. Wentworth, 69 Me. 247; Brooks v. Austin, 95 N. C. 476. The case of Peet v. Peet, 81 Iowa, 172, 46 N. W. 1051, cited to sustain this view, is not in point, and by implication rests on the opposing doctrine. The following authorities hold that the contract to be enforced must secure a provision for the wife not unreasonably disproportionate to the means of the intended husband: 2 Scrib. Dower (2d Ed.) 424; Gould v. Womack, 2 Ala. 83; Woerner, Adm'n, 1, 264; Kline's Estate, 64 Pa. 122; Ruth Bierer's Appeal, 92 Pa. 265; Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Tarbell v. Tarbell, 10 Allen (Mass.) 278; Shea's Appeal, 121 Pa. 302, 15 Atl. 629, 1 L. R. A. 422; Stilley v. Folger, 14 Ohio, 647; Smith's Appeal, 115 Pa. 319, 8 Atl. 582; Neeley's Appeal, 124 Pa. 406, 16 Atl. 883, 10 Am. St. Rep. 594; Ludwig's Appeal, 101 Pa. 535.

The common law cherished nothing more than the right of dower. The wife was dowable in one-third of the lands seised and possessed by the husband during coverture. And yet this right could be effectually barred by a jointure in lieu of dower made before marriage with her consent, without regard to the adequacy or inadequacy of the provision. In this state her right of dower only attaches to the land owned by her husband at his death. He may (excepting homestead) sell, without her consent, every foot of land, and squander the proceeds, and defeat her dower absolutely. It is subject to every vicissitude of business venture, and is a most precarious expectancy. She may not survive him, and, if she do, the period of her enjoyment may come when its value, measured by her prospect of life, may be reduced to a minimum. There is no standard by which a court can, as of the time an antenuptial settlement is made, value such a future right. The same infirmities and uncertainties, though in an increased ratio, apply to her expectancy as distributee of personality; the additional one of children to share being, in most cases, probable. If a court shall take the value of his estate when the contract is made as a criterion, it will happen often that the provision assumed on this basis to be just will far exceed what she would have gotten after a life's shipwreck in the absence of a contract. On the other hand, the conditions may be reversed. The problem is to estimate what is

a reasonable consideration for surrendering a future estate involved in so much doubt and hazard.

The rule contended for would be variable in its results according to the ideas of different judges as to what provision would be reasonable. It is plain that, under this rule, no such settlement would, in any sense, have any sanctity as a contract. It could have no fixed character until the judges before whom it finally came had decided whether it be reasonable. The fullest disclosures of property might be made, the advice of friends and lawyers be invoked, all solemnities of execution and acknowledgment be observed, and yet it would be a mere problem as to what would be reasonable, projected into the future, to be decided, perhaps, by an unborn judge according to his peculiar notions, not confined by definite rules, and formed at a different period of time, under the influence of changed conditions of society.

This rule leaves out of view entirely marriage as a consideration. Where a settlement made by the husband on the wife, without fraud on her part, and in consideration of marriage, has been attacked by creditors, it has been uniformly sustained, and all the authorities concur in saying that marriage is the highest consideration for such a settlement. It is a sufficient consideration from the woman to enable her to take all of her intended husband's estate from his creditors. In our opinion, there is no sound reason why she may not, if of age and acting freely and understandingly, agree, in consideration of the marriage alone, to give up the pecuniary benefits that would come from it. The value of the marriage can be estimated by no one as well as herself, and if it be accepted by her freely, as an equivalent for monetary sacrifices, the courts should not interfere after she has obtained the marriage she contracted for, no matter how great such sacrifices may be, provided she was not misled.

In this case the contract recites that a marriage is to be solemnized, and then proceeds as follows: "I, S. B. Spurlock, in consideration of the consummation of said marriage, do hereby and herein give," etc. When the portion binding her is reached it says: "And I, the said Margaret Mallon, contract and agree with the said S. B. Spurlock, in consideration of the said conveyance," etc. Marriage is not made a consideration for her agreement. It need not be specifically mentioned as a consideration. *Naill v. Maurer*, 25 Md. 538. But here the terms of the instrument confine the consideration expressly to the conveyance made to her. Being so exactly limited in a contract drawn by his lawyer, it may well be held to have been entirely pecuniary. When this contract was made, the engagement to marry had been entered into. By the engagement she acquired a valuable right which, in case of a breach of contract, could have been enforced, and measured with reference to Spurlock's estate. She could have refused to sign the contract

without impairing her right to have the marriage consummated, or to enforce indemnity for a refusal.

Spurlock must have known that her marital rights, if not cut off, would in all probability be very valuable. Defendants prove that he took his own lawyer to her to explain the instrument. The relations of the parties had become confidential. He voluntarily assumed the office of having her instructed in respect of the agreement, and introduced Mr. Stubblefield to her for that purpose. Mr. Stubblefield testifies that he said nothing to her in regard to the effect of the marriage upon her rights as to her own money, either in the absence of a contract or under the contract proposed. He says that, in his opinion, the money, if repaid to her before marriage, would have remained her separate estate. If he entertained this erroneous idea, it is not reasonable to suppose that she knew that she was surrendering her money. It does not appear that the question of her money was in any way considered, although her rights in it were to be affected by the marriage. Stubblefield shows that he did not contemplate it. It is evident, from his testimony, that he did not advise her as to the rights she had acquired by the engagement. She had a right to expect a fuller exposition of her legal status in respect of the purely money bargain she was making than she received.

It is manifest that she was not put in a position to deal intelligently with her rights. The result justifies this conclusion. Spurlock, by the marriage, acquired the absolute right to the \$3,700 he owed her. She gave up all her rights in his estate. She got a life-estate in a house and lot, which, with improvements, had just cost him about \$6,000. She was 40 years of age. The life-estate could not have exceeded, if it equaled, in value the amount of money she surrendered by the marriage. She practically, then, under the marriage and the contract, got nothing, and so surrendered for nothing, and not in consideration of the marriage, a legal right acquired by the engagement, which Spurlock was bound to know had great prospective value. This is not a case simply of ignorance or mistake of law on her part. This, standing alone, cannot be relieved against. Other elements exist in the transaction. Those in whom she had confidence, upon whom she had a right to rely, procured from her, (though certainly, so far as Stubblefield is concerned, not with wrong intent,) for an expressed pecuniary consideration, a contract most detrimental to her; and, though voluntarily assuming to instruct her, they failed to advise her as to her legal rights, and as to the real consideration she was getting under the combined effects of the contract and the marriage. * * *

Complainant was not dealing at arms-length, nor under the advice of her own counsel. Assuming to instruct, they should have done so fully, and she had a right to presume that such was the

case. A failure to so advise, where such close confidence is reposed, whether purposely or through ignorance or misapprehension, is equivalent to positive misadvice.

There is another important fact, which has great weight and must be considered as one of the controlling elements in the transaction. She testifies that Spurlock told her that he was heavily in debt, and made the impression on her that he was not worth much. Other witnesses testified that he frequently spoke of being oppressed by his large indebtedness, and thus she is corroborated. Thus the impression produced by him was calculated to influence her to yield, as of little value and for an inadequate consideration, what, upon full information, would have been apparently of great value. If the contract was freely entered into in consideration of marriage, the disproportion between the estate and the settlement is no ground for presuming that proper information in regard to the value of the husband's estate was not possessed. In such a case there is no necessity for a disclosure.

The case is different where the contract relates in terms to a money bargain, and it affirmatively appears that misleading impressions were made, and that the opposite party in interest, who undertook to advise her of her rights, and upon whom she, from the confidential relations existing between them, relied on, failed to give her such instructions as would fairly put her in a position to judge of the rights which she was yielding; and when these acts concur, and the contract made is greatly to her disadvantage, a court of equity will not give it effect. That she may have entered into the contract, even with a full understanding, is not the question. The court cannot speculate about this. We hold that, under the facts stated, it was not fairly obtained, and therefore we cannot sustain it as an equitable bar to her rights.

It can make no difference that Spurlock subsequently gave her his note for this money. This was, in law, nothing but a gratuity. The money became his absolutely by the marriage, no matter what he may have thought about it. It was in no way secured to her, and was liable for his debts. He had it entirely in his power, to dispose of it in any way he might choose. He could not, by giving it to her subsequently, thus putting her in as good a position as if it had been reserved or voluntarily yielded by the contract, destroy her rights in his estate, which had not by the agreement made, under the facts as they existed, been impaired beyond equitable remedy. No subsequent bounty, be it ever so munificent, could cure the infirmities of such a transaction, and convert it into a binding agreement. The decree of the chancellor is affirmed.

II. Postnuptial Settlements ³

CLOW v. BROWN.

(Appellate Court of Indiana, Division No. 1, 1904. 37 Ind. App. 172, 72 N. E. 534.)

Action by James B. Clow and others against John S. Brown and others. From a decree in favor of plaintiffs for less than the relief demanded, they appeal. Transferred from the Supreme Court.

BLACK, J.⁴ The appellants brought suit against the appellees, John S. Brown, Mary V. Brown, and Fannie B. Coddington, upon a judgment rendered by the circuit court of Clinton county January 9, 1900, in favor of the appellants against the appellee John S. Brown, and to set aside, as fraudulent as against his creditors, certain conveyances of real estate situated in Montgomery county to the other appellees, and a mortgage of real estate in that county to the appellee Mary V. Brown; such conveyances and mortgage having been executed by the appellee John S. Brown September 9, 1899. * * *

John S. Brown and Mary V. Brown (then Mary Vance), in contemplation of their marriage, entered into a written contract, signed and sealed by them, respectively, in duplicate, December 17, 1886, the body of which contract was as follows: "This article of agreement by and between John S. Brown and Mary V. Vance, both of the city of Crawfordsville, State of Indiana, witnesseth, that the said parties now having in contemplation a marriage with each other, do hereby agree as follows: Said parties do hereby mutually agree to renounce and waive, and they do hereby renounce and waive, any and all rights of inheritance each may have under the law of the State of Indiana by reason of said proposed marriage, to the property of the other; and it is further agreed that in case said Mary D. Vance shall survive said John S. Brown, that upon his death she shall be paid the sum of ten thousand dollars in cash out of the estate of said Brown, this sum to be paid in consideration of her waiver in the estate of said Brown as above set forth."

At the time of the making of this contract, Mary D. Vance was in good health and in the fortieth year of her age, and John S. Brown was in good health and was 63 years old. He was then in prosperous circumstances, and was worth from forty to sixty thou-

³ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 88-92.

⁴ Part of the opinion relating to other conveyances is omitted.

sand dollars. He was the owner of real estate of the probable value of \$30,000, and the court found that the contract was a just and reasonable provision for his wife in his circumstances at that time. Afterward, pursuant to the contract, the parties thereto were duly married December 21, 1886.

Subsequent to this marriage, and long prior to September 9, 1899, John S. Brown had incurred a liability to the appellants for a statutory penalty growing out of his relations with the Crawfordsville Waterworks Company, as a director thereof, and he and others had been sued by the appellants on account of such liability, and the action had been pending in the courts of Montgomery and Clinton counties since August, 1889; and the proceedings finally culminated in a judgment duly rendered by the Clinton circuit court against John S. Brown and the estate of Robert B. F. Pierce for \$6,203.82, January 9, 1900. At that time the estate of Pierce was insolvent, and at no time has it had assets out of which any part of the judgment could be collected, which judgment is still in full force and wholly unpaid. * * *

John S. Brown, September 9, 1899, executed to his wife, the appellee Mary V. Brown, a deed of conveyance for lots 17 and 20 and Tract B, above mentioned, and a mortgage on the eastern and greater portion, described, of Tract A. This mortgage was given to indemnify the mortgagee from the payment of a balance of \$155.30 to a bank named, and secured by mortgage on the property that day conveyed by Brown to his wife, and also to secure and indemnify her against the payment of a debt of \$1,500, and interest thereon, secured by mortgage in favor of one Thomas on the property so conveyed to her. The conveyance and mortgage were so executed by John S. Brown, and were accepted by Mary V. Brown "in lieu and in satisfaction of" the antenuptial contract above mentioned, and were so executed by John S. Brown in view of the fact of his insolvency, and with full knowledge of both parties thereto of his financial condition at the time. * * *

There is somewhat greater difficulty in determining the question in relation to the postnuptial conveyance and mortgage from Brown to his wife. It is contended on behalf of the appellants that the antenuptial contract between them was so framed that it did not make Brown the debtor of his wife, and that they could not, as against the appellants, make a postnuptial settlement of that contract, except in accordance with the terms of the contract itself. If it were necessary to refer to the marriage itself as the consideration for the postnuptial conveyance and mortgage, it is plain that the conveyance and mortgage must be regarded as voluntary. The irrevocable marriage union could not constitute a valuable consideration for a subsequent agreement of the parties thereto. But if the execution of the conveyance and mortgage may be regarded as having a valuable consideration other than the

marriage, and as being a preference of a pre-existing debt of the husband to the wife, then, under the facts shown by the court's finding, the conveyance and mortgage must be upheld against the attack of the husband's creditors.

In *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, 487, 8 Am. Dec. 520, it was said: "The settlement was a voluntary one. There was no portion advanced by or on behalf of the wife, nor was it founded on any antenuptial contract duly ascertained, or on any other valuable consideration." The chancellor thus indicates what is necessary to support a postnuptial settlement. A postnuptial settlement, if not shown to be made pursuant to and in compliance with a valid antenuptial agreement therefor, must, as against existing creditors, be regarded as voluntary, unless founded upon a valuable consideration other than the marriage. See *Reade v. Livingston*, *supra*; *Lavender v. Blackstone*, 2 Lev. 146.

In *Saunders v. Ferrill*, 23 N. C. 97, 102, it was said: "Valid antenuptial contracts will undoubtedly support a settlement after marriage in conformity to them. There are both a moral and an equitable obligation, which render the articles a good consideration for the settlement. But without such articles a postnuptial settlement is voluntary and void under St. 13 Eliz. (see 1 Rev. St. c. 50, § 1), as has long been settled. So it necessarily must be when by the settlement the husband secures to the wife or issue of the marriage more than by the articles he engaged." See *Maguire v. Nicholson, Beatty*, 592.

In *Magniac v. Thompson*, 7 Pet. 348, 392, 8 L. Ed. 709, it was said by Story, J.: "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. * * * Marriage, in contemplation of law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and, from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration." A wife may, under such articles, become a creditor of her husband, upon his undertaking therein to make an investment of money in her behalf, and a delivery of notes in part performance of the articles was upheld against other creditors of the husband. *Id.*

In *Read v. Worthington*, 9 Bosw. (N. Y.) 617, 628, it was said that "there is no principle which puts a contingent liability beyond the possibility of being protected."

In *Rider v. Kidder*, 10 Vesey, Jr. (Sumner) 360, under a covenant, upon marriage, by the husband, with the trustees, in case his wife should survive him, to pay her a sum of money, it was held that she was a creditor, within the statute of Elizabeth against

fraudulent conveyances, as against a fraudulent conveyance made by him to a third person, in a suit to set aside the fraudulent conveyance, brought after his death by his widow as executrix.

In *Blow v. Maynard*, 2 Leigh (Va.) 29, Carr, J., gave the subject of postnuptial settlements an examination, citing a number of cases, and said that the giving up an interest in the settlor's estate will support such a settlement. "The cases," he said, "also show that not only the relinquishment by the wife of a certain and fixed interest in her husband's estate, but also of a contingent interest, will support a postnuptial settlement, where there is no badge of fraud, as the giving up her interest in a bond, though contingent. 1 Eq. Ca. Abr. 19; 2 Ves. 16. So, likewise releasing her jointure or dower. Pre. in Cha. 113; 2 Lev. 70, 147; 2 Vern. 220."

In *Cottle v. Fripp*, 2 Vernon, 220, a husband had settled a jointure issuing out of certain real estate on his wife. Later the wife joined the husband in a sale of that real estate, "and in consideration thereof, and, in lieu of her jointure," the husband gave a certain bond in her favor, which was upheld, as against a subsequent creditor of the husband.

In *Scott v. Bell*, 2 Lev. 70, a wife joined in an alienation of her jointure, and had another made the same day. It was held that the new settlement was not voluntary. It was said by Hale and the court that the second settlement was not void as to a subsequent lease made by the husband, "for, the old settlement being destroyed and the new one made the same day, an agreement by him to make the new settlement, in consideration the wife would pass the fine and bar the old settlement, shall be intended, and the consideration shall extend to all the uses of the new settlement, for it shall not be presumed that the wife would have parted with her estate by the old settlement unless the baron would make the same provision for her and her issue by the new." In that case the lands in the new settlement were said to be almost of double value to those in the first settlement, yet by direction of the court the jury gave their verdict sustaining the new settlement.

In *Ward v. Shallet*, 2 Ves. 16, a wife had a contingent interest under a bond given by her husband on the marriage. She agreed to part with that interest upon her husband making another settlement upon her. It was said by the Lord Chancellor that the parting with her contingent interest under the bond was a clear consideration, that a contingent interest may be a consideration as well as a certain interest, and that the wife, insisting on the benefit of it, was barred from any claim under the bond.

By the terms of the antenuptial contract, Brown and his prospective wife, in contemplation of their marriage, renounced and waived all the rights of inheritance of either of them under the law by reason of the marriage, and agreed that, if the wife should survive the husband, she upon his death should be paid \$10,000 in cash

out of his estate in consideration of her said waiver in his estate. The conveyance and mortgage were executed by the husband and accepted by the wife "in lieu and in satisfaction of the antenuptial contract." They were not executed pursuant to the antenuptial contract, or by way of carrying into effect any contract made in consideration of the marriage; nor can the marriage be regarded as entering into the consideration for the conveyance and mortgage.

Under our modern statutory system, the husband and wife could contract with each other without the intervention of a trustee. By the postnuptial settlement, if valid, the antenuptial contract was abrogated in consideration of the new settlement, and all the rights and obligations of the parties, respectively, created by the earlier contract, were set aside. The husband was freed from any obligation under that contract for the payment of money to the wife out of his estate, and was restored to any rights in her property renounced and waived thereunder, while her renunciation and waiver therein of rights of inheritance by virtue of the marriage were also abrogated, for the new settlement was in lieu of the old contract and in satisfaction of it, and not merely of the contingent promise therein.

It does not appear what property, if any, the wife owned, other than that obtained in the postnuptial settlement. The property which she thus acquired, and any other real estate owned by her, or of which she might afterward become seised, would be held by her subject to the rights of a husband in the property of his wife under the law. If any advantage of value was lost by the wife or gained by the husband through the abrogation of the old contract, it cannot be said that there was not a valuable consideration for the new contract. While a contingent indebtedness, or obligation to pay upon a contingency, is not for some purposes to be regarded as a present debt, yet, under the authorities, such a contingent liability as is here involved may be preferred by the debtor in failing circumstances. We have no means of determining that the consideration for the conveyance and mortgage was so grossly inadequate as to invalidate them at the suit of creditors.

We do not find any substantial ground of complaint on the part of the appellants against the conclusions of law. Judgment affirmed.

SEPARATION AND DIVORCE

I. Agreements of Separation¹

HIETT v. HIETT.

(Supreme Court of Nebraska, 1905. 74 Neb. 96, 103 N. W. 1051.)

Commissioners' opinion. Action by Rose Hiett against Wesley Hiett for divorce. The trial court granted an absolute divorce, but denied permanent alimony. From that portion of the decree, plaintiff appeals.

AMES, C.² * * * At the time of the marriage, in 1887, both of the parties were well advanced in years; she being a widow, the mother of six children varying in age from 5 to 17 years, and he a widower, the father of four children of mature ages, all of whom had ceased to reside with him. He and his wife and her children resided together and constituted the family until the children, one after another, reached years of maturity, and established homes of their own, and thereafter the marriage relation subsisted until 1902, when a scene of violence occurred, and a final separation took place. * * * The family were laborious and frugal, * * * and by the rise in the value of land bought and used for a farm and family homestead had accumulated, at the time of the separation, property of a value variously estimated by witnesses, but probably worth not far from \$6,000, subject to an indebtedness, secured by a mortgage on the farm of \$2,600, leaving a surplus of say \$3,400 to \$3,600. The personal property consisted of about \$1,000 worth of neat cattle and of other live stock and of utensils, such as are usually kept on a farm, to the estimated value of about \$1,500.

A few days after the separation the husbands of two of the daughters of the plaintiff and two of her sons visited the defendant, and made an agreement with him on her behalf for a perpetual separation thereafter, and for a division of property in contemplation and consideration thereof. For that purpose they visited the farm of the defendant, and inspected the premises and acquainted themselves with the quantity and character of his possessions. It is not proved that he was guilty of any fraud, concealment, or intimidation in the transaction, or that they did not acquire fully and accurately all the information they desired. The

¹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 93-95.

² Part of the opinion is omitted.

plaintiff was not present, she having intrusted the protection of her interests to the persons named. After the matter had been amicably adjusted to the apparent satisfaction of all persons concerned, the plaintiff was called upon to attend, with the defendant and the intermediaries, at the offices of a firm of attorneys in a neighboring village, where the agreement was reduced to writing and executed by both parties in the manner prescribed by law for the execution and acknowledgment of deeds of real estate. The instrument recited the occasion and purpose of its execution, viz., the perpetual separation of husband and wife, the release by the latter of her dower and homestead rights in the land, and her interest in so much of the personal estate as was not set apart to her in severalty and freed from the claims of her husband, and which consisted of 28 of the 50 head of neat cattle, and a horse, harness, and buggy, certain articles of household furniture, certain domestic fowls, and 50 bushel each of corn and oats. What all these articles were worth it is difficult, if not impossible, to ascertain; the neat cattle alone probably not far from \$500, and the rest from \$100 to \$200, or possibly more. Doubtless the value, both of what was taken and of what was left, was considerably greater for use than for sale. The instrument concluded with mutual releases of property and marital rights and obligations except the right of either party to prosecute an action for a divorce. A division and separation of the property pursuant to the agreement took place at once, and shortly afterwards this action was begun.

The answer pleaded this instrument in bar of the demand of the petition for permanent alimony, and the reply assails it in general terms as being "unfair and unjust," and as having been obtained from the plaintiff in consequence of threats and ill usage by the defendant, and of her ignorance of her rights in the property divided. But there is no averment of any specific act or fact of fraud, ill usage, or intimidation with respect to making or carrying out of the agreement, and, as we have said, none is proved, and we are cited to neither principle nor authority for holding that any will be presumed. The whole tenor of the argument of counsel for appellant is that the agreement was improvidently made. Whether such fact, if it existed, would authorize the court to set aside or disregard the instrument, we are not called upon to decide, and do not decide. The weight, both of reason and authority, is that such agreements, made after separation, are, if fair and free from fraud, imposition, or undue means, in furtherance of good morals, and in accord with sound policy. They stand upon a quite different basis from those made in contemplation and consideration of future separation. Daniels v. Benedict, 97 Fed. 367, 38 C. C. A. 592; Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453. No prior decision of this court in conflict herewith has been brought to our attention. * * *

We do not, however, intend to commit ourselves to the doctrine contended for by appellee, and which is, perhaps, held by some of the authorities that an instrument like that under discussion is to be treated in all respects like other contracts upon a valid consideration between parties *sui juris*, and impeachable for fraud or duress only by compliance with the strict rules of procedure and proof applicable to suits involving such agreements. While there is no presumption against the fairness and good faith of such arrangements, we think that the presumption in their favor is not so strong as in cases of contracts between parties not so related, and that public policy, as well as due regard for the disabilities of the "weaker vessel," requires that the court should scrutinize them closely, without too much respect for formal rules of pleading and procedure, and see to it that no unconscionable advantage obtained through fraud or intimidation, or even by reason of ignorance, improvidence, or passion, is availed of to the unjust benefit of the stronger and more capable or more crafty spouse. We do not find, however, any of these elements in the record before us. The persons who made the contract and settlement on the behalf of the appellant were her next of kin and their spouses. They were certainly the peers in intelligence and experience of the broken old man with whom they dealt. There was no fraud or concealment, and they labored under no delusion, either as to the character or value of the property or as to the legal or equitable rights of the parties thereto, and they were fully cognizant of all the history and circumstances of its acquisition and accumulation; and they furthermore had an interest, both direct and indirect, in seeing to it that their mother secured all to which she was entitled. In the absence of a showing to the contrary, the presumption is strong that they succeeded in attaining that object.

We do not feel called upon to go into an elaborate discussion of items and values of property. Alimony is not to be awarded either as an emolument to the wife or as a punishment for the husband. The defendant is advanced in years, and left alone to struggle unassisted with a comparatively heavy burden of indebtedness, and regard must be had for his subsistence in his old age. The plaintiff obtained by the settlement at least as much as, or probably considerably more than, she would have acquired under the statute of descents and distributions if her husband had died intestate on the day before the contract was made. We think that under the circumstances she has nothing of which to complain, and recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.⁸

⁸ See, also, *Effray v. Effray*, 110 App. Div. 545, 97 N. Y. Supp. 286 (1905).

II. Jurisdiction to Grant Divorce⁴

ELLIS v. ELLIS.

(Supreme Court of Minnesota, 1893. 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514.)

GILFILLAN, C. J.⁵ Appeal from an order appointing an administratrix. Stating the history of the matters involved in chronological order, in 1869 Matthew Ellis and Rachel Cottrell, then residents in Wisconsin, intermarried in that state, and resided therein—the latter part of the time at Hudson—from the time of their marriage till October, 1883, when they came to St. Paul, Minnesota. February 29, 1884, she commenced by proper personal service of summons an action against him for divorce in the circuit court for the county of St. Croix (in which Hudson is situated), in said state. Her complaint was sworn to by her, and it alleged, among other things, that she then was, and for more than three years last past had been, a resident of said county and state, and that for more than a year prior to bringing the action the defendant had willfully deserted and refused to live and cohabit with her; and it demanded judgment dissolving the marriage, and requiring the defendant to pay her the sum of \$8,000 alimony. * * *

March 27, 1884, judgment in that action was rendered, dissolving the marriage between the parties, and allowing the plaintiff therein the alimony stipulated; and that alimony was paid. September 2, 1886, Matthew Ellis and Flora Wilson intermarried, and they lived together as husband and wife until December 7, 1892, when he died in St. Paul, Ramsey county, in this state. Flora Ellis, the second wife, filed a petition in the probate court of said county, stating the necessary jurisdictional facts, alleging that Matthew Ellis died intestate, and that she was his widow, and asking to be appointed his administratrix. On the day appointed for the hearing Rachel Ellis appeared, denied that Flora was the widow, alleged that she was the widow, and asked that she be appointed administratrix. At the same time appeared a brother and sister of deceased, representing that the deceased had made a will, still in force, and asking the court to make the proper order or decree in the premises. The probate court appointed Flora administratrix, and on an appeal to the district court, in which the court

⁴ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 97, 98.

⁵ Part of the opinion is omitted.

heard all the parties, that court affirmed the decision of the probate court. * * *

The principal question in the case was presented by the appellants' offer to prove, and the ruling of the court excluding the evidence, that at the time of bringing the action in Wisconsin and of the divorce decree neither of the parties to it was a resident of that state, but that both were residents of this state. It is claimed for the evidence that, if admitted, it would have shown that the Wisconsin court had no jurisdiction of the subject-matter of the action, to wit, the marital relation between the parties; that consequently the decree was void; Rachel remained the wife, and is now the widow, of Matthew; and that the marriage with Flora was void. The question thus raised is of great importance, and difficult to satisfactorily determine. It is an undisputable general proposition that the tribunals of a country have jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties have an actual, bona fide domicile within its territory. This necessarily results from the right of every nation or state to determine the status of its own domiciled citizens or subjects without interference of foreign tribunals in a matter with which they have no concern. But when in the court of a state an action for divorce is brought, and a decree of divorce rendered, the court is presumed to have determined the facts essential to its jurisdiction, among them the residence of the parties. When, as between whom, and to what extent is such determination binding in the state in which the parties are in fact residents?

The cases in which the question may arise may be divided into three classes: First, in proceedings between the state of the parties' actual residence and one of the parties; second, in proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it; third, in proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended. In the second class of cases, since it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it, the decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment.

Of the decisions in cases coming under the first class we refer to four—Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; and State v. Armington, 25 Minn. 29—all cases between the state of actual residence and one of the

parties. In the first of these the record of the judgment showed that neither of the parties was a resident of Utah, where it was rendered, so that the record impeached itself. It was, of course, held that the judgment was void. In each of the others it was held that, in order to show want of jurisdiction in the court rendering the judgment, it might be shown that neither of the parties resided within the state in which it was rendered, and, that being shown, it was void. In the opinion in each case language is used apparently sustaining the proposition that such would be the rule however the question of the validity of the judgment might arise. In *People v. Dawell*, Mr. Justice Cooley delivered the prevailing opinion, Mr. Chief Justice Christiancy concurring, and Mr. Justice Campbell dissenting. It was enough for the purpose of that case to decide whether the judgment was valid as against the state of residence. Whether it was valid as between the parties was not before the court; and such was the case in *Hood v. State* and *State v. Armington*. So far as the state of residence is concerned, it must be taken upon the authorities, and certainly in this state, upon the *Armington Case*, that it is not bound by a judgment divorcing two of its resident citizens, rendered by a court of another state. There are reasons why it should not be bound, however it may be between the parties which we will presently refer to.

It does not follow that the judgment is void in the third class of cases. A judgment operating on a *res* may be binding between the parties to the action without binding one not a party, but interested in the *res*. In an action for divorce the *res* upon which the judgment operates is the status of the parties. There are three parties interested in that—the husband, the wife, and the state of their residence. This was in the mind of Mr. Justice Cooley in writing the opinion in the *Dawell Case*. He said: "But it is said if the parties appear in the case the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively." "As the laws now are, there are three parties to every divorce proceeding—the husband, the wife, and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion." "Such being the case, suppose we admit that the parties may be bound by their voluntary appearance in the foreign jurisdiction. How does that affect the present case? How, and in what manner, did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding; that is to say, of the state of Michigan?"

This line of reasoning was applied by the same court in *Waldo v. Waldo*, 52 Mich. 94, 17 N. W. 710. One question in that case was whether the plaintiff was the widow of Jerome B. Waldo, just as in this it is whether Flora Ellis is the widow of Matthew. Previous to her marriage to Jerome B. she had been married to one Carey, from whom she had obtained a divorce in Indiana, both parties appearing in the action for it. The court held the judgment could not be assailed by showing want of residence in Indiana and residence in Michigan, saying in one part of the opinion: "This state has never complained of that judgment, and neither party has objected to it." The Dawell Case was not referred to, and we may from both cases take the rule in that state to be that, while the state cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another state in an action for divorce, the parties may so bind themselves in respect to their individual interests.

In *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132, a private action, it was held that a judgment of divorce by the court of another state, both parties appearing in the action, could not be assailed on the question of residence. In the course of the opinion the court, Church, C. J., said: "Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits;" thus recognizing the effect of the voluntary submission upon the parties' right to question the judgment. Cases in Massachusetts, to which we are cited by appellants, are hardly of authority on the point, because the decisions were based mainly on a statute of that state. *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28, has only bearing on one phase of this case. It was there held that a plaintiff in an action for divorce and alimony cannot question the jurisdiction of the court after accepting the benefits of the judgment.

It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: "It is true that by a false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to

take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury." Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render; and, of course, what will bind them will bind those who claim through them, or either of them, which is the case with the appellants other than Rachel.

There were other minor questions raised by the assignments of error, but we do not see any merit in any of them. Order affirmed.⁶

III. Grounds for Divorce—Cruelty⁷

TRENCHARD v. TRENCHARD.

(Supreme Court of Illinois, 1910. 245 Ill. 313, 92 N. E. 243.)

FARMER, J.⁸ On the 25th of July, 1907, Anna M. Trenchard filed a bill in the circuit court of Cook county against her husband, Joseph Trenchard, for divorce, on the ground of extreme and repeated cruelty. Defendant answered the bill, denying all its material charges. A hearing was had in the circuit court and a decree entered in favor of complainant granting a divorce and awarding complainant custody of the only child of the parties. Defendant sued out a writ of error from the Appellate Court for the First District to reverse the decree of the circuit court. The Appellate Court affirmed the decree of the circuit court, and upon the petition of defendant a writ of certiorari was awarded by this court and the record is brought here for our review.

The principal contentions of plaintiff in error are that the allegations of the bill as to extreme and repeated cruelty are not sufficient; also that the decree does not recite facts that justify the relief granted.

The bill alleges that the parties were married in August, 1905; that one child was born to them in October, 1906; that the complainant had always conducted herself toward her husband as a dutiful wife, but that he had been guilty of extreme and repeated cruelty toward her; "that in the month of May, 1906, the said Joseph Trenchard violently shook your oratrix and held her down upon a bed with great force; that on or about June 9, 1906, shortly

⁶ Extraterritorial effect of divorce. see *Haddock v. Haddock*, post, p. 144.

⁷ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 100-102.

⁸ Part of the opinion is omitted.

before the birth of her said child, the said Joseph Trenchard sent your oratrix away from their home and said it would embarrass his daughter by a previous marriage to have her around in her condition; that in the months of February and March, in the year 1907, the said Joseph Trenchard persistently quarreled with your oratrix and kept her awake at night, so that your oratrix became the subject of nervous distress; that in the month of April, 1907, the said Joseph Trenchard seized your oratrix and pushed her violently against the door of the room in which they were." Defendant answered the bill, denying his wife had always conducted herself as a dutiful wife; denying that he had been guilty of extreme and repeated cruelty toward her; denying each specific act of cruelty set up in the bill.

The only recital of facts in the decree as to the extreme and repeated cruelty alleged in the bill is, "that the defendant has been guilty of extreme and repeated cruelty, as charged in complainant's bill of complaint." We are of the opinion the bill does not state a case of extreme and repeated cruelty within the meaning of our statute. What is meant by cruelty, as used in our statute, has been the subject of consideration by this court in many cases, and has been construed to mean physical acts of violence; bodily harm, such as endangers life or limb; such acts as raise a reasonable apprehension of bodily harm and show a state of personal danger incompatible with the marriage state. Bad temper, petulance of manner, rude language, want of civil attentions, or angry or abusive words are not sufficient grounds for divorce for extreme and repeated cruelty. *Henderson v. Henderson*, 88 Ill. 248; *Harman v. Harman*, 16 Ill. 85; *Embree v. Embree*, 53 Ill. 394; *Vignos v. Vignos*, 15 Ill. 186; *Turbitt v. Turbitt*, 21 Ill. 438; *Maddox v. Maddox*, 189 Ill. 152, 59 N. E. 599, 52 L. R. A. 628, 82 Am. St. Rep. 431; *Fizette v. Fizette*, 146 Ill. 328, 34 N. E. 799.

But two acts of alleged physical violence are charged in the bill, viz., that in May, 1906, plaintiff in error violently shook his wife and held her down upon a bed with great force, and that in April, 1907, he seized and pushed her violently against a door of a room in which they were. There is no charge that these acts were committed in anger, without justifiable provocation, nor that defendant in error was hurt or injured on either occasion, nor are any facts alleged in the bill from which it is made to appear that as a result of these alleged acts of violence defendant in error might reasonably fear she was in danger of receiving bodily harm at the hands of her husband if she continued to live with him.

The dissolution of the marriage relation is a grave matter and can only be justified where the case is strictly within the statute. Our statute is sufficiently liberal in enumerating the causes for which a divorce may be granted, and it has always been the policy of this court that parties seeking a divorce should bring themselves

within the statute. The dissolution of the marriage tie is a subject in which not alone the parties to it are interested but the public is interested also. * * *

It is not in every case where a wife is justified in leaving her husband and living separate and apart from him that she would be entitled to a divorce on the ground of extreme and repeated cruelty. There is no certificate of evidence in the record and no facts are recited in the decree from which the character of the acts complained of as extreme and repeated cruelty can be determined. The recital that plaintiff in error had been "guilty of extreme and repeated cruelty as charged in complainant's bill" is wholly insufficient as a finding of facts, under the allegations of the bill, to sustain the decree. It has been repeatedly held that a decree in chancery, granting affirmative relief, must be supported by evidence preserved by a certificate of evidence, or by a finding of facts in the decree itself. * * *

The judgment of the Appellate Court and the decree of the circuit court are therefore reversed, and the cause remanded to the circuit court.

RADER v. RADER.

(Supreme Court of Iowa, 1907. 136 Iowa, 223, 113 N. W. 817.)

DEEMER, J. Cruel and inhuman treatment, calculated to endanger life, and consisting of the use of profane, vulgar, and obscene language toward plaintiff, threats of bodily injury, and deprivation of food and wearing apparel, were the grounds alleged for a divorce. These were denied by defendant. The trial court granted the divorce and gave plaintiff the custody of a minor child. The parties were married on the 18th day of March 1903, and they lived together as husband and wife until March 1, 1905, when plaintiff left her husband and went to live with her parents.

The sole question in the case is one of fact, and that is: Was defendant guilty of such inhuman treatment of plaintiff as endangered her life? We shall not, of course, attempt to set out the entire record. It is enough for the purpose of the case to state our conclusions. Whilst the case is not a strong one, we think there is enough to show that defendant used profane, obscene, insulting, and abusive language toward his wife, complained of her cooking, and generally treated her in such a manner as to endanger her life and health. He never, it is true, used physical violence, but he did that which to any ordinary woman is more cruel. After the first few weeks of married life, he seems to have lost all affection for his wife. He was profane and abusive, criticised her cooking, failed to provide her with clothing, and in other ways made life miserable. True, most of the charge defendant denies; but the witnesses were

all before the trial court, and plaintiff's condition of health as au-
topotically disclosed, and her manner and demeanor upon the wit-
ness stand, as well as defendant's appearance and demeanor, should
all be considered and given due weight. And in such cases as this
the finding of the trial court should be given due consideration in
view of the conflicting testimony adduced.

Plaintiff was comparatively a well woman when she married the defendant, and when she left him she was much broken both in health and spirits, and for this defendant seems to have been responsible. It is not necessary, of course, to show physical assaults in order to make out a case of cruelty. The general treatment accorded the wife by the husband should be considered, and if, upon the whole record, it appears that the life and health of the wife has been endangered by ill treatment, be that nothing more than abusive, insulting, profane, and vulgar language, lack of affection, or failure to furnish the necessities of life, a divorce should be granted.

Giving to the finding of the trial court its due weight, we are constrained to hold that the divorce was properly granted. The decree is therefore affirmed.

IV. Same—Desertion ⁹

WATSON v. WATSON.

(Court of Chancery of New Jersey, 1894. 52 N. J. Eq. 349, 28 Atl. 467.)

Suit by George E. Watson against Mary L. Watson for divorce. On exceptions to master's report, advising that the petition be dismissed.

McGILL, Ch. The petitioner and defendant were married in 1871, and from that time until 1890 lived together as husband and wife. In April, 1890, upon the occasion of a disagreement, at which the husband, as he says, merely scolded her, the wife withdrew from his bed, and declared that she would never occupy it with him again. She thereupon removed to the front or sitting room of the two apartments they occupied in a boarding house, locked the door between the apartments, and made her bedroom there until July, 1892, when she took board at another place. I find that during the time in question, although the communications between the husband and wife were rude and severely constrained, they nevertheless admitted of indirect consultations concerning the needs, comfort, and welfare of their two daughters, who were away at

⁹ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 103.

school. The wife also cared for their rooms and linen, and the husband gave her money for her wants, and paid her board. They appeared at meals at the same time, and at the same table, so that their disagreement did not manifest itself to other boarders in the house.

The petition was filed early in the year 1893, and alleges, as ground for divorce, a willful, continued, and obstinate desertion by the husband for two years. To cover that statutory period, the petitioner seeks to include a portion of the time prior to July 1892, and hence the question is presented whether the withdrawal of a wife from sexual intercourse with her husband, assuming that there was no just cause for the withdrawal, alone constitutes "desertion," within the meaning of the statute.

A single word as to a suggestion of acquiescence on the part of the petitioner. It does not appear that he, with determined earnestness, ever sought the restoration of his marital rights. He appears rather to have submitted to the position in which his wife's determination placed him, acting as one who, for cause, acquiesces in the justness of a decision against him, basing whatever feeble effort he may have made in that direction upon consideration for their children. Upon her part, on the contrary, the attitude appears to be one of distress, and yet, filled with consciousness of power which the right gives, she fearlessly demands her support from him. I think, however, that this appearance of acquiescence of the husband rests too largely upon inference and conjecture to be made the basis of a decision. I prefer to assume that there was no acquiescence, and to meet the question first stated.

I have read with interest the elaborate argument of Mr. Bishop, in his work on Marriage, Divorce, and Separation (volume 2, § 1676 et seq.), in favor of an affirmative answer to this question as the "better opinion," but I am unwilling to accept it as the true construction of our statute. The word "desertion," I think, is used in the sense of "abandon," to the extent that the deserted party must be deprived of all real companionship and every substantial duty which the other owes to him or her. It would, I think, degrade the marriage relation to hold that it is abandoned when sexual intercourse only ceases. The lawfulness of that intercourse is perhaps a prominent and distinguishing feature of married life, but it is not the sum and all of it. The higher sentiment and duty of unity of life, interest, sympathy, and companionship have an important place in it, and the thousand ministrations to the physical comforts of the twain, by each in his or her sphere, in consideration of the marriage obligation, and without ceaseless thought of pecuniary recompense, fills it up. These latter factors may possibly, to some extent, exist in other relations of life, but not in completeness. They are all necessary to the perfect marriage relation.

My opinion is that our statute means that divorce may be had when substantially all of these duties and amenities shall have been abandoned by the guilty party, willfully, continuedly, and obstinately, for two years, and not until then. In other words, the desertion must be complete, not partial; and, when the party accused remains in discharge of any duties which rise in value above mere pretense and form, the desertion which the statute contemplates does not exist. This I understand to be the meaning accorded to the word "desertion" in the statute of Massachusetts. Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579; Cowles v. Cowles, 112 Mass. 298.

In the present case, I find that, within two years prior to the filing of the bill, the defendant did remain with her husband, in the discharge of, at least, a substantial portion of her duty to him. I will sustain the master in his conclusion, and dismiss the petition.

PROVOST v. PROVOST.

(Court of Chancery of New Jersey, 1906. 71 N. J. Eq. 204, 63 Atl. 619.)

GARRISON, V. C. This is a petition by Jennie G. Provost against her husband for divorce upon the ground of desertion. The parties were married October 14, 1897. This petition was filed June 21, 1905. The allegation is that the desertion took place on the 7th day of March, 1903. The parties were at that time living at Hackensack, N. J., and upon that day the defendant left Hackensack to go to Darlington, S. C. The defendant was engaged in the life insurance business, and had fallen into dissipated habits, and undoubtedly had frequently been a source of humiliation to his wife. Just before the 7th of March, 1903, his habits led to his discharge from the position which he theretofore had held in the Mutual Life Insurance Company, and the money then due him from that company was paid him. This money, amounting to \$400, he divided, giving \$200 to his wife and retaining \$200.

There is not the slightest evidence that when he left for the South on this occasion he intended to desert his wife. The letters which passed between the parties at this time entirely disprove any such contention. They show that the parties were on the most intimate terms; that the wife was sincerely desirous that he should cease his bad habits and resume life with her again; and his communications to her were all along the same line. I do not think that there was in either of their minds at that time any thought that a desertion or a permanent separation had taken place. He returned to Hackensack in about a month, and constantly saw his wife thereafter for a long period, and undoubtedly endeavored to renew his married life with her. She is a very self-respecting woman, who had always been accustomed to nice surroundings,

although not accustomed to luxuries; and she undoubtedly did not wish to take up life with him again until he should have paid all his debts and secured another home as good as the one they had left, and therefore refused to come and live with him under any other conditions.

I do not think it helpful to review the testimony at length, or to cite either from it or from the letters. I fail to find anywhere in the case any evidence of any desertion within two years before the filing of the petition in this suit. If the petitioner, abandoning her original contention of a desertion on the 7th of March, 1903, now contends that the failure of the husband to support her and the children since his return to Hackensack in April, 1903, constitutes desertion, she cannot succeed in this latter contention. The original separation not being a desertion, it can only be turned into desertion by one party in good faith demanding of the other a resumption of the marital relationship and the refusal of the latter to accede thereto. *McAllister v. McAllister* (N. J. Ch. 1906) 62 Atl. 1131.

So far from the petitioner showing a demand upon her part for a resumption of the marital relationship and a willingness upon her part to return thereto, all of the evidence shows that she refused to go back to her husband excepting upon terms formulated by her. No citations are necessary to establish the doctrine that a wife must accept the situation that her husband is able to maintain, and cannot refuse to live with him because of his inability to support her in the way she demands; that is to say, she cannot so do and then claim that he has deserted her because of his non-fulfillment of her demands.

The petition must therefore be dismissed.¹⁰

V. Defenses—Connivance¹¹

VIERTEL v. VIERTEL.

(Kansas City Court of Appeals, Missouri, 1903. 99 Mo. App. 710, 75 S. W. 187.)

Suit by John F. Viertel against Elizabeth Viertel. Decree for plaintiff. Defendant appeals.

BROADDUS, J.¹² * * * The suit is for divorce, and was commenced on the 9th day of November, 1901. The allegations in the

¹⁰ Affirmed in 73 N. J. Eq. 418, 75 Atl. 1101 (1907), memorandum.

¹¹ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 105.

¹² Part of the opinion is omitted.

petition are that the defendant had been guilty of such indignities and unbecoming conduct as to render plaintiff's condition intolerable, and that she had committed adultery at various times and places during and since July 1, 1900, with one Evelyn Coonfare, and with one Chris Parker in the year 1897. * * * The evidence went to show that the defendant had committed both the acts of adultery charged, and there was also some evidence tending to prove the charge of indignities and unbecoming conduct. The defendant put in evidence the judgment of the former suit, which is reported in 86 Mo. App. 494. The court found that defendant had been guilty of the charges of adultery, that she had referred to plaintiff on the streets of Boonville by calling him a vile and approbrious name, and that she had spoken of him and of his father and mother with contempt and in a vulgar and coarse manner. The court thereupon granted plaintiff a decree of divorce, with the care and custody of the minor child, named Paul.

It is an admitted fact that the former suit, reported in 86 Mo. App. 494, was founded upon a charge of adultery committed by defendant at various times during the years 1898 and 1899 with one Derrindenger, subsequent to the charge of adultery in this case with Parker, but prior to the charge of adultery with said Coonfare. The former suit was dismissed by the trial court, and the judgment was affirmed here. This court there held that the acts charged to have been committed by the defendant were connived at by the plaintiff.

It is contended by defendant that, as the act of adultery charged to have been committed with said Coonfare occurred since the one charged to have been committed with said Derrindenger, the court having found that plaintiff connived at the latter, he was precluded under the law ever thereafter of obtaining a divorce for the same cause. "A husband who connives at one act of adultery by his wife cannot complain of any subsequent act with the same or another participates criminis." 2 Bishop on Mar. & Divorce, p. 116. "A husband who connives at or assents to adultery by his wife with one person will be deemed as assenting to it with others, and will not be entitled to a divorce for a subsequent act of adultery with a different person." Hedden v. Hedden, 21 N. J. Eq. 61.

In Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424, the rule as stated in 1 Pomeroy on Eq. Juris. § 399, was adopted, viz.: "The iniquity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of defendant which the complaining party states as his ground or cause of action; but it must be evil practice or wrongful conduct in the particular matter or transaction in respect to which judicial protection or redress is sought." Although the court recognized the rule in Hedden v. Hedden, supra, the application of the rule as stated by Mr. Pomeroy, supra, shows that the court had

some misgivings on the question. Mr. Nelson, in his work on Divorce and Separation (volume 1, § 486), has this to say: "It is doubtful whether these rulings will be followed by modern courts, for it deprives the husband of the right of repentance and reform, and leaves the wife to commit adultery without fear of divorce."

It is a very harsh rule, to say the least about it, and the only theory upon which it can be supported is that a husband who consents to an act of adultery of his wife has fallen so low in his moral nature as to be forever unable to repent and reform. And it must be admitted that the degradation of such a man is profound. Yet there are other conditions in which he may be found, equally deplorable. Still, it ought not to be the policy of the law to cut off the husband from all inducement to reform, nor, as it were, to license the wife to continue her shameful practices freed from all restraint; and the rule of equity that, when a litigant comes into court, it must be with clean hands, refers only to the matter to be litigated, and no other should be also applied to cases of this character.

We feel constrained, for these reasons, to hold that plaintiff is not debarred from asserting his right to a divorce on account of the defendant's adulterous conduct with said Coonfare, notwithstanding it occurred since the former suit, in which it was held he had connived in her adultery with said Derrindenger; it not appearing that he in any way was particeps criminis. And it may be said that such connivance by the husband of an act of adultery committed by the wife with one person, on the ground of which a bill for divorce filed by him has been dismissed, is not an absolute bar to a divorce for a prior act of adultery committed by her with another person, and not known to the husband at the time he brought his former suit. Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Bishop on Mar. & Div. p. 116.

* * * Affirmed.¹⁸

VI. Same—Condonation¹⁴

CLAGUE v. CLAGUE.

(Supreme Court of Minnesota, 1891. 46 Minn. 461, 49 N. W. 198.)

DICKINSON, J. This is an action for a divorce on the ground of cruelty. The decision of the court in favor of the defendant was based upon the fact that, subsequent to the acts of cruelty which

¹⁸ Rehearing denied June 22, 1903.

¹⁴ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 107, 108.

the evidence tended to establish, the plaintiff, after having been for about 10 months absent from the defendant, voluntarily resumed cohabitation with him, and thereby condoned the previous conduct complained of. We are of the opinion that the case justified this conclusion, and it will not be necessary to here refer to the evidence relating to the defendant's former conduct, nor to the refusal of the court to receive certain evidence offered to show his misconduct. It is well established that the doctrine of condonation is applicable not alone to adultery, but as well to cruelty in the marriage relation (2 Bish. Mar. & Div. §§ 49, 50; Gardner v. Gardner, 2 Gray [Mass.] 434; Sullivan v. Sullivan, 34 Ind. 368; Phillips v. Phillips, 27 Wis. 252, and cases cited); and it may be implied from a voluntary resumption of discontinued cohabitation, although it is true, as a general proposition, that an inference of forgiveness is not to be so readily made against a wife as against a husband. The circumstances under which the renewal of conjugal relations was effected are to be considered with discrimination, with the view of determining whether it was with her free consent, in which case an intention to overlook the past misconduct may be inferred, or whether, on the contrary, she was induced by deception, by considerations of supposed necessity, or by other influences which deprived her conduct of the essential quality of free consent.

Concerning the circumstances of this case, we will only state that after a separation of nearly a year it came about that the parties were occupying separate rooms at a hotel in Minneapolis, to which place the defendant came on business from a distant army post, he being an officer in the army of the United States, and that at length, by consent of the plaintiff, they resumed conjugal relations, and continued to occupy the same room for several days, until the defendant returned to his post. They never afterwards lived together. No acts of cruelty followed this renewal of marital relations. The evidence tended also to show that afterwards, the defendant having been ordered to a post in an eastern city, the plaintiff intended to go there and to reside with him. During the prior separation of the parties the defendant had made provision for the plaintiff's support, and the court was justified in concluding that her resumption of cohabitation was not induced by any actual or supposed necessity. While there was evidence on her part that it was under a promise to make a transfer of property to her, which promise he did not fully perform, that was controverted by him, he testifying that there was no other inducement than such as arose from their marriage relation. We see no reason to overrule the determination of the court as to the fact.

It is said that the defense of condonation was not pleaded by the defendant. It is enough, however, that, although not pleaded, it was tried as a contested fact without objection. Order affirmed.

VII. Same—Recrimination ¹⁵

PEASE v. PEASE.

(Supreme Court of Wisconsin, 1888. 72 Wis. 136, 39 N. W. 133.)

COLE, C. J. The plaintiff and appellant brought this action for a divorce from the bonds of matrimony on the ground of adultery committed by the defendant. The wife denied the charge of adultery in her answer, and by way of recrimination, defense, or bar to the plaintiff's action, asked for a limited divorce from the husband on the ground of cruel and inhuman treatment on his part. On the trial of the issue of adultery the jury found against the defendant, and the court found the plaintiff guilty of cruel and inhuman treatment of the defendant, and held that neither party was entitled to a decree of divorce. The sole question before us on this appeal is the correctness of this decision.

Our statute makes adultery and cruel and inhuman treatment of the wife by the husband equally grounds of divorce. Rev. St. 1878, § 2356. The statute places them upon the same ground, attended by the same legal consequences. The cruelty complained of and proven were acts of personal violence on the part of the husband; his striking her in one instance a severe blow in the face with his fist while she was lying in bed, which blow caused a wound that bled freely, and left a bruise for several days upon the face. The circuit court also found other instances proven of violent conduct on the plaintiff's part towards his wife, which in some cases were mitigated to some extent by her improper and exasperating behavior. The evidence is not before us, but we must presume it fully sustained the finding of the court on the facts. So, the simple question presented is, where it is shown that each party has been guilty of an offense which the statute has made a ground for divorce in favor of the other, will the court interfere and grant relief to either offending party?

We do not perceive upon what logical principle the court could grant redress to the husband for the adultery of the wife when he himself has been guilty of an offense which would give her a right to an absolute divorce were she without fault. Both parties have violated the marriage contract, and can the court look with more favor upon the breach of one than the other? It is an unquestioned principle that where one party is shown to have been guilty of adultery such party cannot have a divorce for the adultery com-

¹⁵ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 109.

mitted by the other. *Smith v. Smith*, 19 Wis. 522. Mr. Bishop says there is an entire concurrence of judicial opinion upon that point both in England and in this country, and that it makes no difference which was the earlier offense; nor even that the plaintiff's act followed a separation which took place on the discovery of the adultery of the defendant. 2 Bish. Mar. & Div. § 80. In the forum of conscience, adultery of the wife may be regarded as a more heinous violation of social duty than cruelty by the husband. But the statute treats them as of the same nature and same grade of delinquency. It is true, the cruelty of the husband does not justify the adultery of the wife; neither would his own adultery—but still the latter has ever been held a bar. And where both adultery and cruelty are made equal offenses, attended with the same legal consequences, how can the court, in the mutual controversy, discriminate between the two, and give one the preference over the other? It seems to us that, as the law has given the same effect to the one offense as the other, the court should not attempt to distinguish between them, but treat them alike and hold one a bar to the other. The following authorities enforce this view of the law where the divorce law is like our own: *Hall v. Hall*, 4 Allen, 39; *Handy v. Handy*, 124 Mass. 394; *Nagel v. Nagel*, 12 Mo. 53; *Shackett v. Shackett*, 49 Vt. 195; *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717; 2 Bish. Mar. & Div. §§ 78-87. See, also, *Adams v. Adams*, 17 N. J. Eq. 325; *Yeatman v. Yeatman*, L. R. 1 Prob. & Div. 489; *Lempriere v. Lempriere*, Id. 569. We therefore think the circuit court was right in holding upon the facts that neither party was entitled to a divorce, because each was guilty of ~~an~~ offense to which the law attached the same legal consequences.

But the plaintiff's counsel contends that under section 2360, which provides that in an action for divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce (1) when the offense shall appear to have been committed by the procurement or with the connivance of the plaintiff; (2) where the adultery charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof or by the voluntary cohabitation of the parties with knowledge of the offense; (3) when there shall have been no express forgiveness and voluntary cohabitation of the parties, but the action shall not have been brought within three years after the discovery by the plaintiff of the offense charged. As the adultery, he says, was found in the case, but none of the facts set forth in the above three subdivisions were found to exist, therefore the divorce should have been granted. This provision is declaratory of the common law, and gives the trial court discretion to refuse a divorce for adultery where certain things were proven or shown to exist. It might be claimed, in view of the statutory provisions, that the court had no discretion in the matter where the adultery was established, but

was absolutely bound to grant the divorce, though there had been connivance of the parties, or condonation, or the injured party had unduly delayed bringing the action after a discovery of the offense. To remove all doubt upon that point the provision was enacted. It was not intended to do away with the general principle that one cannot have redress for a breach of the marriage contract which he has violated by committing a like offense as that of which he complains, but must come into court with clean hands. This principle still pervades our law, and must be recognized.

From these views it follows that the judgment of the circuit court must be affirmed.¹⁶

CUSHMAN v. CUSHMAN.

(Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 38, 79 N. E. 809.)

Libel for divorce. There was judgment dismissing the libel, and libelant excepted.

HAMMOND, J. To a libel of the wife for divorce on the ground of adultery the husband filed an answer denying the adultery and setting up by way of recrimination prior desertion on the part of the wife. At the trial the judge found that the husband was guilty of the adultery, but as to the charge of desertion he did not find that the wife's conduct amounted to desertion, although he did find "that there was on her part such unmindfulness of marital obligations as to preclude the granting of her libel," and ordered it to be dismissed. In other words, the wife's charge of adultery was sustained but the husband's charge of desertion was not.

However it may be elsewhere, the rule in this commonwealth is that while the offense set up in recrimination need not be of the same nature as the one relied upon in the libel, yet it must be such as in law would be of itself sufficient ground for divorce. Hall v. Hall, 4 Allen, 39; Clapp v. Clapp, 97 Mass. 531; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509; Walker v. Walker, 172 Mass. 82, 51 N. E. 455, and cases there cited. If upon the evidence the judge had found desertion, then the dismissal of the libel would have been correct; but he did not find it, and there is nothing in the facts found by him as to the conduct of the wife which estopped her from a divorce on the ground of the husband's adultery. This case does not belong to the class of which Lyster v. Lyster, 111 Mass. 327, is a type, where the libellee attempts to justify the charge alleged in the libel (in that case it was desertion) by showing misconduct on the part of the libelant which, though not sufficient in law to constitute a ground

¹⁶ Contra: Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192 (1909), holding that, in a suit for divorce on the ground of adultery, cruelty and habitual drunkenness cannot be pleaded by way of recrimination.

of divorce may yet be sufficient in law to justify the act relied upon in the libel. *Watts v. Watts*, *ubi supra*.

In the case before us a separate and distinct offense on the part of the libellee, having no relation to the offense charged, is set up as a bar to the libel. In such a case, as has been before stated, the offense set up must be sufficient of itself to constitute a ground of divorce. Exceptions sustained.

VIII. Extraterritorial Effect of Divorce¹⁷

HADDOCK v. HADDOCK.

(Supreme Court of United States, 1906. 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867.)

Mr. Justice WHITE delivered the opinion of the court.¹⁸

The plaintiff in error will be called the husband and the defendant in error the wife.

The wife, a resident of the state of New York, sued the husband in that state in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights, and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the state of Connecticut a divorce which was conclusive.

At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, *viz.*, desertion by the wife, was

¹⁷ For discussion of principles see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 110.

¹⁸ Part of the opinion is omitted.

false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the state of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband, without justifiable cause, abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of \$780 a year from the date of the judgment. The action of the referee was sustained by the supreme court of the state of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the court of appeals. As, by the law of the state of New York, after the affirmance by the court of appeals the record was remitted to the supreme court, this writ of error to that court was prosecuted.¹⁹

The federal question is, Did the court below violate the Constitution of the United States by refusing to give to the decree of divorce rendered in the state of Connecticut the faith and credit to which it was entitled? * * * In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicil in Connecticut, sued the wife in that state as a person whose residence was unknown, but whose last known place of residence was in the state of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the state of New York.

With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are required to be borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by states to the judicial

¹⁹ For the decision below, see 178 N. Y. 557, 70 N. E. 1099 (1904).

decrees of other states. That is to say, where a decree rendered in one state is embraced by the full faith and credit clause, that constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the state where rendered. *Harding v. Harding*, 198 U. S. 317, 49 L. Ed. 1066, 25 Sup. Ct. 679.

Second. Where a personal judgment has been rendered in the courts of a state against a nonresident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the Fourteenth amendment, void as against the nonresident, even in the state where rendered; and, therefore, such nonresident, in virtue of rights granted by the Constitution of the United States, may successfully resist, even in the state where rendered, the enforcement of such a judgment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. * * *

Third. The principles, however, stated in the previous proposition, are controlling only as to judgments in personam, and do not relate to proceedings in rem. That is to say, in consequence of the authority which government possesses over things within its borders, there is jurisdiction in a court of a state by a proceeding in rem, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. *Pennoyer v. Neff*, *supra*.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one state, conformably to the laws of such state, or the state, through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. *Maynard v. Hill*, 125 U. S. 190, 31 L. Ed. 654, 8 Sup. Ct. 723. * * *

Fifth. It is no longer open to question that where husband and wife are domiciled in a state there exists jurisdiction in such state, for good cause, to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicil has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such

state for divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause. *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604.

Sixth. Where the domicil of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired. This was clearly expressed in *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226. * * *

Seventh. So also it is settled that where the domicil of a husband is in a particular state, and that state is also the domicil of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the state of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause. *Atherton v. Atherton*, 181 U. S. 155, 45 L. Ed. 794, 21 Sup. Ct. 544.

Coming to apply these settled propositions to the case before us, three things are beyond dispute: (a) In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the state of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that state. (b) As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicil of the wife continued in New York. (c) As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicil in that state, and was not there individually domiciled, and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicil of the wife within the state or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicil of the husband in that state, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other states in and by virtue of the full faith and credit clause of the Constitution. In other words, the final question is whether, to enforce in another jurisdiction the Connecticut decree, would not be to enforce in one state a personal judgment rendered in another state against a defendant over whom the court of the state rendering the judgment had not acquired jurisdiction? Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a state to persons within its jurisdiction, but, on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced either within the letter or spirit of the doctrine stated in the third or fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject-matter or of the person of the defendant, the courts of another state are not required, by virtue of the full faith and credit clause of the Constitution, to enforce such decree. *National Exch. Bank v. Wiley*, 195 U. S. 259, 269, 49 L. Ed. 184, 190, 25 Sup. Ct. 70, and cases cited.

I. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicil within one state of one party to the marriage gives to such a state jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other states by force of the full faith and credit clause of the Constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens, has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government, in virtue of its authority over marriage, may dissolve the tie as to citizens of another government, other governments would have a similar power, and hence the right of every government as to its own citizens might be ren-

dered nugatory by the exercise of the power which every other government possessed.

To concretely illustrate: If the fact be that where persons are married in the state of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the state of Connecticut, there acquiring a domicil, and procure a dissolution of the marriage which would be binding in the state of New York as to the party to the marriage there domiciled, it would follow that the power of the state of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail. And conversely, the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that state to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the states whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other states. In other words, any person who was married in one state and who wished to violate the marital obligations, would be able, by following the lines of least resistance, to go into the state whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and the public policy of the other states. Thus the argument comes necessarily to this—that to preserve the lawful authority of all the states over marriage it is essential to decide that all the states have such authority only at the sufferance of the other states. * * *

II. It is urged that the suit for divorce was a proceeding in rem, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the res, entitled to be enforced in the state of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicil of the person there suing, and yet attributes to the decree resting upon the domicil of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject-matter of the controversy. But putting this contradiction aside, what, may we ask, was the res in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory, then, upon which the proposition proceeds, must be that the res in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that state, it must be admitted under the hypothesis stated, that before the husband de-

serted the wife in New York the res was in New York, and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the res, it follows that it was divisible, and therefore there was a res in the state of New York and one in the state of Connecticut. Thus considered, it is clear that the power of one state did not extend to affecting the thing situated in another state. * * *

Nor is the conclusive force of the view which we have stated been met by the suggestion that the res was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that state had the power to determine the status of the nonresident wife by a decree which had obligatory force outside of the state of Connecticut. Here, again, the argument comes to this—that, because the state of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that state also had the authority to oust the state of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that state.

III. It is urged that whilst marriage is, in one aspect, a contract, it is nevertheless a contract in which society is deeply interested, and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen, but as to a citizen of New York who was not subject to the jurisdiction of the state of Connecticut. The proposition involves in another form of statement the non sequitur which we have previously pointed out; that is, that because government possesses power over marriage, therefore the existence of that power must be rendered unavailing.

Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without, at the same time, saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that state. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes

that because, in the exercise of its power over its own citizens, a state may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a state may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another state.

The distinction was clearly pointed out in *Blackinton v. Blackinton*, 141 Mass. 432, 5 N. E. 830, 55 Am. Rep. 484. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicil in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicil of the husband was not the domicil of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But this circumstance was held not to be controlling, and the decree was awarded. * * *

IV. The contention that if the power of one state to decree a dissolution of a marriage which would be compulsory upon the other states be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one state must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement.

But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a state should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each state is given the power of overshadowing the authority of all the other states, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribu-

nals having no jurisdiction. Further, the admission that jurisdiction in the courts of one state over one party alone was the test of the right to dissolve the marriage tie as to the other party, although domiciled in another state, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one state would have a right to acquire a domicil in a different state and there institute proceedings for divorce. It would hence necessarily arise that domicil would be no longer the determinative criterion, but the mere race of diligence between the parties in seeking different forums in other states or the celerity by which in such states judgments of divorce might be procured would have to be considered in order to decide which forum was controlling.

On the other hand, the denial of the power to enforce in another state a decree of divorce rendered against a person who was not subject to the jurisdiction of the state in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the states over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy, but also to protect the individual rights of their citizens. It does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction, and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. It causes the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective states just as that clause operates upon other rights—that is, it compels all the states to recognize and enforce a judgment of divorce rendered in other states where both parties were subject to the jurisdiction of the state in which the decree was rendered, and it enables the states rendering such decrees to take into view, for the purpose of the exercise of their authority, the existence of a matrimonial domicil from which the presence of a party not physically present within the borders of a state may be constructively found to exist. * * *

As respects the decisions of this court: We at once treat as inapposite, and therefore unnecessary to be here specially reviewed, those holding (a) that where the domicil of a plaintiff in a divorce cause is in the state where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other states to recognition under the full faith and credit clause (*Cheever v. Wilson*, *supra*) ; (b) that, as distinguished from legal domicil, mere residence within a particular state of the plaintiff in a divorce cause brought in a court of such state is not sufficient to

confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a nonresident defendant (Andrews v. Andrews, 188 U. S. 14, 47 L. Ed. 366, 23 Sup. Ct. 237; Streitwolf v. Streitwolf, 181 U. S. 179, 45 L. Ed. 807, 21 Sup. Ct. 553; Bell v. Bell, 181 U. S. 175, 45 L. Ed. 804, 21 Sup. Ct. 551). This brings us to again consider a case heretofore referred to, principally relied upon as sustaining the contention that the domicil of one party alone is sufficient to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, viz., Atherton v. Atherton, 181 U. S. 155, 45 L. Ed. 794, 21 Sup. Ct. 544.

The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicil. This is apparent from the following passage, which we excerpt from the opinion, at 181 U. S. 171, 45 L. Ed. 803, and 21 Sup. Ct. 550: "This case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the state which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

The contention, therefore, that the reasoning of the opinion demonstrates that the domicil of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the Atherton Case are taken into view, that the case could not have been decided merely upon the ground of the domicil of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these:

The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicil at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicil and went to New York. The husband sued her in Kentucky for a divorce. Before the Kentucky suit merged into a decree the wife, having a residence in New York, sufficient, under ordinary circumstances, to constitute a domicil in that state, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective states at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined, and pleaded such

decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree, and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause.

Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicil of the parties, since upon that hypothesis, even if the efficacy of the individual domicil had been admitted, no solution would have been thereby afforded of the problem which would have risen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had the paramount right to enter a binding decree. Having disposed of the case upon the principle of matrimonial domicil, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicil which, isolatedly considered, was inadequate to dispose of, and was, therefore, irrelevant to, the question for decision. * * *

Deducing the law of the several states from the rulings of their courts of last resort which we have just reviewed, and ignoring mere minor differences, the law of such states is embraced within one or the other of the following headings:

(a) States where the power to decree a divorce is recognized, based upon the mere domicil of the plaintiff, although the decree when rendered will be but operative within the borders of the state, wholly irrespective of any force which may be given such decree in other states. Under this heading all of the states are embraced with the possible exception of Rhode Island.

(b) States which decline, even upon principles of comity, to recognize and enforce as to their own citizens, within their own borders, decrees of divorce rendered in other states, when the court rendering the same had jurisdiction over only one of the parties. Under this heading are embraced Massachusetts, New Jersey (with the qualification made by the decision in *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. Rep. 612), and New York.

(c) States which, whilst giving some effect to decrees of divorce rendered against its citizens in other states where the court had jurisdiction of the plaintiff alone, either place the effect given to such decrees upon the principle of state comity alone, or make such limitations upon the effect given to such decree as indubitably establishes that the recognition given is a result merely of state comity. As the greater includes the less, this class of course embraces the cases under the previous heading. It also includes the states of Alabama, Maine, Ohio, and Wisconsin.

(d) Cases which, although not actually so deciding, yet lend themselves to the view that *ex parte* decrees of divorce rendered

in other states would receive recognition by virtue of the due faith and credit clause. And this class embraces Missouri and Rhode Island.

Coming to consider, for the purpose of classification, the decided cases in other states than those previously reviewed, which have been called to our attention, the law of such states may be said to come under one or the other of the foregoing headings, as follows:

Proposition (a) embraces the law of all the states, since in the decision of no state is there an intimation expressing the exception found in the Rhode Island case [Ditson v. Ditson, 4 R. I. 87] which caused us to exclude that state from this classification.

Under proposition (b) comes the law of the states of Pennsylvania, Vermont, and South Carolina. A line of decisions of the state of North Carolina would also cause us to embrace the law of that state within this classification, but for a doubt engendered in our minds as to the effect of the law of North Carolina on the subject, resulting from suggestions made by the North Carolina court in the opinion in *Bidwell v. Bidwell*, 139 N. C. 402, 52 S. E. 58, 2 L. R. A. (N. S.) 324, 111 Am. St. Rep. 797.

Proposition (c) embraces the law of Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska, and New Hampshire. And it is pertinent here to remark that in Michigan (3 Comp. Laws Mich. 1897, § 8621, c. 232, § 6) the obtaining of a divorce in another state from a citizen of Michigan is made cause for the granting of a divorce in Michigan to its citizen. A like provision is also in the statutes of Florida. Rev. St. Fla. 1892, § 1480.

Under proposition (d) we embrace the remaining states, although as to several the classification may admit of doubt, viz., California, Illinois, Iowa, Kentucky, and Tennessee.

It indubitably, therefore, follows from the special review we have made of cases in certain states, and the classification just made of the remaining state cases which were called to our attention, * * * that the contention is without foundation, that such cases establish by an overwhelming preponderance that, by the law of the several states, decrees of divorce obtained in a state with jurisdiction alone of the plaintiff are, in virtue of the full faith and credit clause of the Constitution, entitled to be enforced in another state as against citizens of such state. Indeed, the analysis and classification which we have made serves conclusively to demonstrate that the limited recognition which is given in most of the states to such ex parte decrees of divorce rendered in other states is wholly inconsistent with the theory that such limited recognition is based upon the operation of the full faith and credit clause of the Constitution of the United States, and, on the contrary, is consistent only with the conception that such limited recognition as is given is based upon state comity.

No clearer demonstration can be made of the accuracy of this statement than the obvious consequence that if the full faith and credit clause were now to be held applicable to the enforcement in the states generally of decrees of divorce of the character of the one here involved it would follow that the law of nearly all of the states would be overthrown, and thus it would come to pass that the decisions which were relied upon as establishing that the due faith and credit clause applies to such decrees would be overruled by the adoption of the proposition which it is insisted those decisions maintain. The only escape from this conclusion would be to say that the law of the states as shown by the decisions in question would remain unaffected by the ruling of the full faith and credit clause, because not repugnant to that clause. This would be, however, but to assert that the full faith and credit clause required not that full faith and credit be given in one state to the decrees of another state, but that only a limited and restricted enforcement of a decree of one state in another would fulfil the requirements of that provision of the Constitution. To so decide would be to destroy the true import of the full faith and credit clause, as pointed out in the outset of this opinion. Thus, in its ultimate aspect, the proposition relied upon reduces itself to this,—either that the settled law of most of the states of the Union as to divorce decrees rendered in one state, where the court rendering the decree had jurisdiction only of the plaintiff, must be held to be invalid, or that an important provision of the Constitution of the United States must be shorn of its rightful meaning.

Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character rendered in Connecticut, within the borders of the state of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause.

It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, affirmed.²⁰

Mr. Justice BROWN, Mr. Justice HARLAN, Mr. Justice BREWER, and Mr. Justice HOLMES, dissented.

²⁰ Compare with *Haddock v. Haddock* the cases of *Kline v. Kline*, 57 Iowa, 386, 10 N. W. 825, 42 Am. Rep. 47 (1881) and *Feit v. Feit*, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. Rep. 612 (1899). See, also, *Ellis v. Ellis*, ante, p. 127.

PART II

PARENT AND CHILD

LEGITIMACY, ILLEGITIMACY, AND ADOPTION

I. Legitimacy of Children¹

SCANLON v. WALSH.

(Court of Appeals of Maryland, 1895. 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.)

FOWLER, J.² * * * On the 26th March, 1891, David J. Walshe, of Baltimore city, died, leaving a will disposing of his personal property and one-third of his real estate, and intestate as to the balance of his real estate, which latter consisted of by far the larger and more valuable part of the property, known as the "Mansion House," on the northwest corner of Fayette and St. Paul streets, in said city. A bill was filed in the circuit court of Baltimore city by Carlotta Walshe, for the sale of said real estate, against a number of persons claiming to be heirs at law of her husband, David J. Walshe, three of them being her own children, born while she was living in lawful wedlock with a former husband, and the others being sisters and the children of a deceased sister of said Walshe. Proper proceedings were had, and, by agreement of parties, the whole property was sold for the sum of \$70,000, which sale was duly confirmed. By a pro forma order, the court below ratified auditor's account B, by which the sum of \$25,795.41 was allowed to three children of the plaintiff, as their share of the proceeds of sale. From this order the sisters and the children of a deceased sister of Walshe have appealed; and the question is, who are the heirs at law of David J. Walshe?

There are two sets of claimants: First, two sisters and several nephews and nieces; and, secondly, the plaintiff's three children, the youngest of whom is about 24 years of age, who, although born

¹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 112, 113.

² Part of the opinion is omitted.

while their mother was married to and living in lawful wedlock with her first husband, Florian V. Simmonds, from whom she was divorced, claim to be the children of said Walshe, whom she afterwards married, and his heirs at law, because subsequent to their birth their mother and their alleged father married, and he acknowledged them to be his children.

A contention whose foundations are so contrary to good morals, public policy, and the presumptions of law can be maintained only by some statute which not only introduces "a new law of inheritance," as our statute does (*Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408, opinion by Chief Justice Taney), but which, to bring this case within its terms, must also abrogate some rules of evidence which we are not inclined either to weaken or destroy. The statute upon which the appellees, the children of Carlotta Walshe, rely to maintain their contention, is section 29, art. 46, of the Code, which provides that, "if any man shall have a child or children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated and capable in law to inherit and transmit inheritance as if born in wedlock."

This section was before this court for construction in the case of *Hawbecker v. Hawbecker*, 43 Md. 516, where a married man had by his wife four children born in lawful wedlock, and during the life of his wife he also had six children by another woman. His wife died, and he subsequently married the mother of the last-mentioned children, whom he acknowledged as his, and treated them as he did the children of his first wife. It was very earnestly contended in that case that the section above quoted should not be construed so as to include within its terms a case in which children are conceived and born when their parents are under impediment to marry. But it was held that although the legislature, no doubt, in thus mitigating the severe rule of the common law, intended to hold out to the surviving parents an inducement to marry, and thus put a stop to the further illicit intercourse between them, yet "the main purpose and intent of the enactment * * * was to remove the taint and disability of bastardy from the unoffending children, whenever their parents did marry, without regard to the deepness of the guilt on the part of the parent." And, in concluding the opinion, the language of Chief Justice Taney in the case of *Brewer v. Blougher*, *supra*, to the same effect, in relation to the same provision of law, is quoted approvingly. We said: "The legislature has not seen fit to make any exceptions to its operation. Its terms embrace every case where 'any man shall have a child or children by any woman whom he shall afterwards marry.'" *Hawbecker v. Hawbecker*, *supra*.

It will be observed, however, that in the case we have last cited there was no question whatever made as to the paternity or illegit-

imacy of the children who were admitted to have been born out of wedlock. It was assumed that the reputed was the real father, and that the children were illegitimate; and the only question was whether the law was applicable to the admitted facts. But here we have a different condition. Indeed, this is the very opposite to Hawbecker's Case; for, while the force of the broad terms of the law is here admitted, it is contended that the foundation facts—the facts of illegitimacy and of the alleged paternity—are not established at all, because—First, the witnesses, are incompetent; and, secondly, even if competent, their evidence is not of that strong, distinct, satisfactory, and conclusive character which is required to overcome the presumption expressed in the common-law rule "*Hæres legitimus est quem nuptiæ demonstrant*," or another expression of the same rule, "*Pater est quem nuptiæ demonstrant*."

The old rule in England was, and also in this country (1 Greenl. Ev. § 28), that this presumption of legitimacy was conclusive. But it is said the courts did not long permit so violent an estoppel. 1 Bish. Mar. & Div. § 1170. This legal presumption has been characterized as the foundation of every man's birth and status, and of the whole fabric of human society, and nowhere has its full force and extent been so fully acknowledged and so well expressed as in the case of *Hargrave v. Hargrave*, 9 Beav. 553, by Lord Langdale, the then master of rolls, decided in 1846. He says: "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." "Such evidence as this," says his lordship, "puts an end to the question, and establishes the illegitimacy of the child of a married woman." And in the same case it was held that where opportunities occurred for sexual intercourse between the husband and wife, and there was no proof of his impotency, no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child.

It was said in *Craufurd v. Blackburn*, 17 Md. 56, 77 Am. Dec. 323, that the declarations of the parents were not admissible to defeat the consequences of marriage, such as that the children are bastards; and Lord Mansfield said in *Goodright v. Moss*, Cowp. 594: "It is a rule founded in decency, morality, and policy that the father and mother shall not be permitted to say after marriage that their offspring is spurious." And, in our opinion, the testimony

of the adulterer, when offered for the same purpose, should likewise be excluded; especially so in all cases in which it appears that the proof does not exclude the possibility or probability of access of the husband to the wife. In such cases, as Lord Langdale said in *Hargrave v. Hargrave*, *supra*, there being no proof of impotency, no evidence will be admitted to show illegitimacy. To this extent, at least, we think the presumption of the legitimacy of the child of a married woman should be conclusive.

The mere fact of marriage and acknowledgment should not, under the facts of this case, be received as proper evidence of illegitimacy. The fact of illegitimacy should first be proved, and then the marriage and acknowledgment may be offered to prove paternity. And so it was held in *Grant v. Mitchell*, 83 Me. 27, 21 Atl. 178. And in *Hemmenway v. Towner*, 1 Allen (Mass.) 209, the declarations of the adulterer offered to show illegitimacy of the child of a married woman were excluded, the husband and wife having lived together as such until six months next before the birth of the child. It is true these two cases, last cited, were decided upon statutes not altogether like ours; but the questions decided were questions of evidence, and we think what was said in those cases on this subject is particularly applicable to this case. Now, the only testimony before us which can properly be resorted to, to prove illegitimacy, is that of the plaintiff Carlotta Walshe, which, as we have seen, is inadmissible for that purpose. At the most, her testimony may be offered to show she was untrue to her husband. 1 Bish. Mar. & Div. And so, also, as to the declarations and letters of David Walshe which appear to have been offered to prove acknowledgment of the children. Neither will be admissible to show the husband is not the father, if he had or could have had access, as indicated in *Hargrave v. Hargrave*, *supra*; and that he could have had access, we think, is clearly shown in this case, for the separation did not occur until several years after the birth of the youngest child. But the testimony of Carlotta Walshe, as well as that of the adulterer, if he were alive, would be inadmissible to show bastardy, and equally so his declarations, because they are both estopped to swear to a state of facts in conflict and inconsistent with the proceedings for divorce, and for change of name of her three younger children. She will not be allowed now to come into court, and recklessly contradict what she alleged in the one and swore to in the other. *Edes v. Garey*, 46 Md. 41; *Hall v. McCann*, 51 Md. 351; *Railroad Co. v. Howard*, 13 How. 335, 14 L. Ed. 157.

And it appearing that he was the instigator of both proceedings, and in a position to know the truth, the estoppel should work equally against him, his declarations and his letters. * * * Order reversed.

II. Adoption of Children ³

THOMAS v. MALONE.

(Kansas City Court of Appeals, Missouri, 1910. 142 Mo. App. 193, 126 S. W. 522.)

Action by Kate Thomas against Effie Malone, individually and as executrix of Basley W. Malone, deceased. From a judgment for defendant, plaintiff appeals.

JOHNSON, J. This is an action in equity, the object of which is to obtain a decree that plaintiff is a pretermitted heir of Basley W. Malone who died testate in Howard county, and is entitled to share in his estate. Defendant demurred to the petition on the ground that the facts alleged therein fail to constitute a cause of action. The demurrer was sustained, and plaintiff, refusing to plead further, brought the cause here by appeal.

Briefly stated, the facts alleged in the petition are as follows: Plaintiff, the daughter of Alex and Caroline Malone and niece of Basley W. Malone, was born in 1859. Her parents had a large family and were poor. Her uncle, who had been married five or six years, had no children and was in good pecuniary circumstances. Plaintiff's mother survived her birth only two weeks, and in contemplation of death besought Basley and his wife to adopt her newborn child. They consented on condition that Alex, the father, would renounce all claims to his child. Alex made the required promise, and Basley and his wife agreed with the dying woman to adopt plaintiff. The statutory requirements necessary to a legal adoption were not performed, but immediately following the death of plaintiff's mother Basley and his wife took plaintiff to their home, and thereafter cared for and treated her as their child. They reared her in the belief that she was their child, and it was not until she reached the age of 12 years that she learned from others the true facts about her parentage. Basley and his wife then assured her that she was their adopted child, and that they would always consider and treat her as their own daughter. They told her—and she believed the statement—that they had legally adopted her. The father of plaintiff observed his promise not to assert any parental rights over her, and she lived with her foster parents until she was 25 years of age, rendering to them the filial love and duty a daughter owes her natural parents. Then she married, and thereafter lived with her husband. Plaintiff's foster mother died childless

³ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 115.

in 1890 leaving her estate to her husband. He remarried, and his second wife died childless in 1900. Afterward he married the defendant, and some years later died without issue. He left a will in which he gave all of his property to defendant, his widow, and failed to mention plaintiff.

Though the petition alleges that Basley Malone and his wife agreed that they would legally adopt plaintiff, it does not specifically state they agreed to make plaintiff their heir. Doubtless the absence of such promise was what prompted the trial court to sustain the demurrer to the petition. Plaintiff argues that since she fully performed the contract made for her benefit by her dying mother, equity will enforce that contract though it falls short of meeting the statutory requirements relating to the adoption of children, and, treating her as though she were a lawful child of deceased, will recognize her statutory rights as a pretermitted heir. Section 4611, Rev. St. 1899 (Ann. St. 1906, p. 2505).

The courts of this state, under certain circumstances, have enforced oral contracts of adoption, and it may be considered as settled that equity will decree an adoption and its resultant rights in cases where no statutory adoption exists when to do otherwise would result in palpable injustice. Adoption was unknown to the common law, and statutes in derogation of the common law are to be strictly construed. But the rule of strict construction is not extended to the act of adoption itself. *Hockaday v. Lynn*, 200 Mo. 464, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672. And "since the statute has made the adoption of a child lawful, the law, for the same reasons that it sometimes enforces oral contracts affecting real estate, will not allow the mere failure of one party to do his duty to work an irreparable wrong to one who has fully performed his part. This court, for that reason, has not only held an oral contract for adoption valid, but has also required fulfillment of a collateral agreement of the adopting parent to leave the adopted child his estate at his death." *Lynn v. Hockaday*, 162 Mo., loc. cit. 125, 61 S. W. 888, 85 Am. St. Rep. 480; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270. The contract for the benefit of plaintiff made by her mother was valid in equity, and when plaintiff performed it and her foster parents received the benefit of her performance she became, in equity, their adopted child. Equity will treat as done that which ought to have been done, and as Basley in his lifetime would not be heard to repudiate the obligation of a contract of which he had received the full benefit, neither will his executor be allowed to stand on ground so inequitable.

Defendant argues: "An agreement for the adoption of a child and to leave property to it when fully performed by the child may be enforced in equity. This is not on the ground that the child has been legally adopted, but because a contract to leave property

to the child, when fully performed on its part, may be enforced in equity"—citing 1 Encyc. of Law (2d Ed.) 728, which refers to Healey v. Simpson, 113 Mo. 340, 20 S. W. 881. In that case the contract, by which it was proposed to adopt the child, provided "that they (the adopting parents) will govern, educate, maintain, and in all respects treat said child as though she were their own natural offspring; and it is further agreed that said Evangeline Brewster shall have and inherit from the estate of said parties of the second part in the same manner and to the same extent that a child born of their union would inherit." In effect, this meant that in adopting the child they would give it the status of an issue of their own bodies—no more, no less. A statutory deed of adoption would have conferred on the child these precise rights and nothing more. Chapter 90, Rev. St. 1899 (Ann. St. 1906, pp. 2728-2730). Without any specific agreement to that effect, a child legally adopted will inherit from its adoptive parents in like manner as their lawful issue. Moran v. Stewart, 122 Mo. 295, 26 S. W. 962; Moran v. Stewart, 132 Mo. 73, 33 S. W. 443. This being true, a contract to adopt carries the incidental right of heirship which, as in the case of a natural child, may be cut off only by the will of the adoptive parent in which the adopted child is mentioned.

It follows from what we have said that the controlling consideration in Healey v. Simpson, *supra*, was not, as we have shown, the incidental promise that the adopted child would inherit as though she had been born of her adoptive parents, but was the agreement to adopt the child, and the subsequent performance by the child of her part of the agreement. In the later case of Lynn v. Hockaday, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480, the oral contract to adopt did not mention the rights of the child as an heir, and still that contract was enforced. So the contract in the present case should be enforced. The blessings which only a child can bring to a home were bestowed on a childless couple by plaintiff's performance of the contract made by her mother for her benefit. Plaintiff is entitled to her reward, and since she was forgotten in her adoptive father's will, she must be accorded the rights given by law to a pretermitted heir.

The demurrer to the petition should have been overruled. On proof of the facts alleged in her petition, plaintiff should have a decree declaring her status as an heir. The judgment is reversed and the cause remanded.

III. Status of Illegitimate Children ⁴

CROAN v. PHELPS.

(Court of Appeals of Kentucky, 1893. 94 Ky. 213, 21 S. W. 874, 23 L. R. A. 753.)

In proceedings for the distribution of the estate of Wesley Phelps, deceased, a bastard, an order was made giving the estate to the devisees of the widow, from which order James Croan and others, as collateral heirs of the bastard's deceased mother, appeal.

HAZELRIGG, J. Wesley Phelps, at quite an advanced age, died intestate, and without issue, the owner of a large estate in Bullitt county, Ky. The proof is clear that he was the illegitimate son of Alice McDaniel, whose death preceded his some years. He left a widow, who claims the entire property. It is also claimed by the descendants of the brothers and sisters of Phelps' mother, Alice; and the sole question presented upon this appeal is, who takes the property? The lower court gave it to the widow, or rather to her devisees and legatees, she having died after instituting this action.

The appellees base their claim to the estate under subsection 9, § 1, c. 31, of the General Statutes, which provides that, if there be neither paternal nor maternal kindred, the whole estate shall go to the husband or wife of the intestate. They say that by "kindred" is meant such as can lawfully inherit. The mother being dead, and there being no legal father, and no provision for the transmission of inheritance from a bastard to collaterals, the appellees contend it is as if the paternal and maternal kindred were wholly extinct, and that the contingency arose upon which the widow became entitled to take the whole estate.

The appellants contend that, under section 5 of the statute quoted, the mother, if living, would have taken, and that her brothers and sisters or their descendants must now take in her stead; that the intestate was capable under the statute of transmitting the estate to and through his mother on to them. That section is as follows: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother; and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents."

It is insisted that the expression "on the part of or to the mother" must be construed liberally, and as meaning transmissibility of

⁴For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 114.

estate, not only "to," but through, the mother, and on to her collateral kindred. In determining the meaning of these words and the proper legal exposition of the statute, we must keep in mind that by the rules of the common law a bastard had no inheritable blood, and could neither receive from nor transmit an inheritance to his father, mother, brothers, or sisters. The Kentucky statute of descents of December, 1796, was an innovation on the common law, and reads as follows: "Bastards also shall be capable of inheriting, or transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother." This was a copy of the Virginia statute of 1787, and with reference to which the supreme court of the United States, in Stevenson's Heirs v. Sullivant, 5 Wheat. 255, 5 L. Ed. 70, said: "We understand it to be that they [bastards] shall have a capacity to take real estate by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants, in like manner as if they were legitimate." The expression "on the part of their mother" was not held to confer the right to inherit on the mother from her bastard child, but the whole effect of the section and this expression was simply to enable the bastard to take by inheritance from or through the mother in the direct line, and to pass that inheritance with the same directness to his own issue; and the illegitimate brothers in that case were denied the right to inherit from their legitimate brother. While quasi legitimate in some limited respects, they were nevertheless said to be bastards in all others, and as such could have neither father, brothers, nor sisters, and their inheritable blood was confined within the narrow limits of the very letter of the law.

This restricted construction was followed by the Kentucky courts until the act of 1840, though not without a strong dissent in Scroggin v. Allan, 2 Dana, 363, (decided in 1834.) This act provided "that the mother shall be and is hereby rendered capable to inherit as heir or distributee of her bastard child; and brothers and sisters of the same mother born out of wedlock shall be capable to inherit, and take by descent a distribution from each other, as though born in wedlock, and as brothers and sisters of the whole blood." And notwithstanding the seeming generous intention of the statute to make the illegitimate child legitimate *ex parte materna* to all intents and purposes as though born in wedlock, yet in Remmington v. Lewis, 8 B. Mon. 606, (decided in 1848,) the court used this language: "It is impossible, upon any admissible construction of the language of the act, to consider it as establishing a legal relationship for the purpose of inheritance between a bastard and any other of his bastard relations but his mother and such other illegitimate issue as she may have." It does not operate to establish a right either in the illegitimate children to inherit from the legitimate or in the legitimate children to inherit from the il-

legitimate. "Under this construction," says the court, "the bastard has, in view of the law of descents, no brothers or sisters except the illegitimate children of the same mother, and no other collateral kindred who can take his estate as heirs; and upon his death without issue, without lineal maternal ancestor alive, and without brother or sister, the illegitimate issue of his mother, or the descendants, his wife, if he leaves one, is his heir, under the fourteenth section of the statute, and not the legitimate son of his mother."

If the legitimate son of the mother of the bastard cannot inherit his estate through their common mother, how can the collateral kindred of the mother in this case hope to do so? It cannot be contended that our statute is more liberal than that of 1840. Indeed, it is only by a forced construction that the mother herself can be said to inherit from her bastard child. The plain act of 1840 confers for the first time that right on her, in its opening clause, thus: "That the mother shall be and is hereby rendered capable to inherit as heir of her bastard child" which was not inserted in the Revised Statutes (1852) or the General Statutes (1873). Instead thereof, the old eighteenth section of the Kentucky act of 1796, copied from the Virginia act of 1787, was adopted with the interpolation of the words "or to" after the words "on the part of." And suppose we adopt the construction given this statute by the supreme court of the United States in *Stevenson's Heirs v. Sullivant*, *supra*, and followed by a majority of this court in *Scroggin v. Allan*, above quoted, we would have this state of the case: Bastards shall be capable of taking real property by descent immediately or through their mother, or on the part of their mother, and of transmitting that same estate without alleviation to their own issue and "to the mother." The old statutes were consistent and harmonious, simply empowering the bastard, though within narrow limits, to inherit property from his mother, which under the common law he could not do, and transmit the same to his own issue. Now, singularly enough, after so inheriting it, he is permitted to transmit it "to the mother" from whom he has just inherited it.

The well-known legal meaning of the expression "on the part of the mother," as construed by the courts, must therefore be discarded, and it must be supposed that they were used in the statute in the sense of "from the mother;" hence the meaning is as if the reading was: "Bastards shall be capable of inheriting and transmitting an inheritance from or to the mother." And even this solution is well-nigh spoiled by the rejection of the alternative "or" properly used in the old statute, and inserting the word "and" in the present one, thus requiring the same estate to be inherited and transmitted to or from the mother. However, the statute must be construed to mean that bastards shall be capable of inheriting from the mother, and of transmitting an inheritance to the mother,

and so must be held to embody, in substance, the provisions of the acts of 1796 and of 1840, but certainly not to extend or broaden them. In the case of Sutton v. Sutton, 87 Ky. 217, 8 S. W. 337, 12 Am. St. Rep. 476, some progress was made towards liberalizing this section, and there the legitimate children of a bastard take what he, if alive, would have taken from an illegitimate brother of the same mother. But it was done under the statute making bastards capable of inheriting and transmitting an inheritance on the part of each other as if born in lawful wedlock of the same parents. There is no such statute in aid of the collateral kindred of the mother.

In Allen v. Ramsey's Heirs, 1 Metc. 635, and Berry v. Owens' Heirs, 5 Bush, 452, the right of the bastard to inherit from the mother's collateral kindred was very decidedly negatived. In Jackson v. Jackson, 78 Ky. 390, 39 Am. Rep. 246, this court, through Judge Cofer, held that the bastard could not inherit through his mother from her ancestors. "It must be regarded," says the court, "as the settled law of this state that a bastard cannot inherit from collaterals from whom his mother, if living, would have inherited; and it would seem to follow, as a necessary logical sequence, that he cannot inherit from the ancestors of his mother." And while the exact question was not before the court, the learned judge added: "And this construction is somewhat fortified by the fact that a bastard can only transmit an inheritance in the ascending line 'to his mother,'"—and, to preserve harmony in the construction of the statute, the court was constrained to adopt this confessedly strict construction.

Whatever might have been the original intention of the lawmakers towards broadening the inheriting capacity of these innocent offspring of their mother's incontinence, it must be confessed that a rather illiberal view of the statutes respecting them has obtained, which, however, must now be adhered to. Let the judgment below giving the estate to the wife's beneficiaries be confirmed.

4/26/26

DUTIES AND LIABILITIES OF PARENTS

I. Parent's Duty to Maintain Child¹

PORTER v. POWELL.

(Supreme Court of Iowa, 1890. 79 Iowa, 151, 44 N. W. 295, 7 L. R. A. 176, 18 Am. St. Rep. 358.)

The district court certifies to this court the following question, upon which it is desirable to have the opinion of the supreme court: "Is a father legally liable to a physician for the latter's services in professionally treating the minor daughter of said father, dangerously attacked with typhoid fever, who, at the date of said treatment, was seventeen years of age, and was then, and had been, residing away from her father's house for three years prior to the rendition of said services, earning and controlling her own wages, and providing herself with clothing, at a place thirty miles distant from her father's place of residence, the father not furnishing, or agreeing with his daughter to furnish, her with any money, or means of support, but consenting to her absence from home; the said professional services being rendered at the request of the said minor daughter, but were rendered and furnished without the procurement, knowledge, or consent of the defendant, and without knowledge of the sickness, until demand was made for payment of said services by plaintiff, the attendance of plaintiff being from day to day, for a period of twenty days?" Judgment for plaintiff. Defendant appeals.

GIVEN, J.² 1. Appellant's contention is that the obligation of parents to support their minor children is only a moral one, and is not enforceable in the absence of statute or promise; that such promise is not to be implied from mere moral obligation, nor from the statute providing for the reimbursement of the public; and that an omission of duty, from which a jury may find a promise by implication of law, must be a legal duty, capable of enforcement by process of law. At first glance, this view of the law seems opposed to our natural sense of justice; yet it is not without support in the authorities. Such is held to be the law in New Hampshire and Vermont. See Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Farmington v. Jones, 36 N. H. 271; Gordon v. Potter, 17 Vt. 348.

¹For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 116.

²Part of the opinion is omitted.

A different doctrine has long since been held in this state. In *Dawson v. Dawson*, 12 Iowa, 513, this court held that "the duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty." In *Johnson v. Barnes*, 69 Iowa, 641, 29 N. W. 759, which was an action by the mother, who had been divorced, against the father, for support furnished their children, the court say: "As there was no promise, the question to be determined is whether one can be inferred in favor of a wife, who supports her child, as against her husband, who has without cause abandoned her and his child. The obligation of parents to support their children at common law is somewhat uncertain, ill defined, and doubtful. Indeed, it has been said that there is no such obligation. * * * But we are not prepared to say that this rule has been adopted in this country, and it should be conceded, we think, that, independent of any statute, parents are bound to contribute to the support of their minor children, and that such obligation rests mainly on the father, in the absence of a statute, if of sufficient ability; and that, in favor of a third person, who supports a child, a promise to pay may and should be inferred on the ground of the legal duty imposed."

In *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395, it is said: "A parent is under a natural obligation to furnish necessaries for his infant children; and, if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." In 5 Wait, *Act. & Def.* 50, the author says: "The duty of parents to support, protect, and educate their offspring is founded upon the nature of the connection between them. It is not only a moral obligation, but it is one which is recognized and enforced by law. * * * In order to hold the person liable in any case for goods furnished, either actual authority for the purchase must be shown, or circumstances from which such authority may be implied. * * * The legal obligation of parents in respect to support, extends only to those things which are necessary; and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them."

Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed.

2. It is further contended on behalf of appellant that the facts certified show an emancipation of his daughter, such as to relieve

him from liability for the services sued for; that support and services are reciprocal duties, and if one is withheld the other may be withdrawn. Parents are entitled to the care, custody, control, and services of their children during minority. To emancipate is to release; to set free. It need not be evidenced by any formal or required act. It may be proven by direct proof or by circumstances. To free a child, for all the period of minority, from care, custody, control, and service would be a general emancipation; but to free him from only a part of the period of minority, or from only a part of the parent's rights, would be limited. The parent, having the several rights of care, custody, control, and service during minority, may surely release from either without waiving his right to the other, or from a part of the time without waiving as to the whole. A father frees his son from service. That does not waive the right to care, custody, and control, so far as the same can be exercised consistently with the right waived. He frees his son of 18 from service for one year. That does not waive the right to his services after the year; and if the waiver has been for an indefinite period the parent may assert his right to the services of the child at any time within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services. * * *

The circumstances disclosed in this case are such as are of frequent occurrence in this country. Parents, either from necessity or from a desire to teach their children to be industrious and self-supporting, emancipate them from service, for a definite or indefinite time, without any intention of thereby releasing their right to exercise care, custody, and control over the child. The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy, sickness, or accident—who, most of all others, need support—would not be entitled to it. Blackstone, in his Commentaries (volume 1, p. 446), says: "The duty of parents to provide for the maintenance of their children is a principle of natural law—an obligation, says Puffendorf, laid on them, not only by Nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents." This obligation to support is not grounded on the duty of the child to serve, but rather upon the inability of the child to care for itself. It is not only a duty to the child, but to the public. The duties extend only to the furnishing of necessities. What are nec-

essaries must be determined by the facts in each case. The law has fixed the age of majority; and it is until that age is attained that the law presumes the child incapable of taking care of itself, and has conferred upon the parent the right to care, custody, control, and services, with the duty to support.

3. There being no direct evidence as to the purposes of the defendant with respect to his daughter, we are to say with what intention he consented to his daughter's going and remaining away from his home as she did. That he intended she should control her own earnings, at least until such time as he should declare otherwise, is evident; but that it was ever his intention that if, by sickness or accident, she should be rendered unable to support herself, he would not be responsible to those who might minister to her actual necessities, we do not believe. Such an inference from these facts would be a discredit to any father. In our view, there was, at most, but a partial emancipation—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control, and support. There was no such an emancipation as exempted the father from liability for actual necessities furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease, or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessities furnished to her.

As already stated, what are necessities must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently necessary for the support and well-being of the defendant's daughter. As we have seen, he had not relieved himself from the duty to furnish her such support, and, from his obligation to do so, may be presumed to have promised payment to any one who did furnish it in his absence. Our conclusion is that the judgment of the district court should be affirmed.⁸

⁸ As to emancipation of child, see *Round Bros. v. McDaniel*, post, p. 193.

As to liability of infant on his own contracts for necessities, see *Kilgore v. Rich*, post, p. 257; *Mauldin v. Southern Shorthand & Business University*, post, p. 259.

Liability of father for support of child, after divorce, see *Gilley v. Gilley*, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307 (1887); *Brown v. Smith*, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680 (1895); *Ramsey v. Ramsey*, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682 (1889).

II. Contracts by Child as Parent's Agent⁴

McCRADY v. PRATT.

(Supreme Court of Michigan, 1904. 138 Mich. 203, 101 N. W. 227.)

Action by Eliza McCrady against Stephen N. Pratt. From a judgment in favor of plaintiff, defendant brings error. Reversed.

MONTGOMERY, J. The plaintiff recovered a verdict and judgment of \$50.25 for boarding the defendant's son. The theory upon which the case was submitted to the jury may be best stated by quoting the charge of the circuit judge:

"It is claimed on the part of the plaintiff that the defendant's son, Charles M. Pratt, with the knowledge and consent of the defendant, and at his request, came to the plaintiff's boarding house and requested board, and said that his father would pay for it, as he was learning the drug business and did not earn much money. It is claimed by the plaintiff that she relied upon these representations and boarded the defendant's son, and that at one time when he was sick that she nursed him and took care of him about two weeks; that he remained with her something like a year, when he began to run behind in his board bill, and shortly afterwards left the city. The plaintiff further claims that the defendant, Stephen Pratt, the boy's father, afterwards came to the city of Grand Rapids, and that she saw him and had a talk with him about the balance due her for the board of his son. Plaintiff further claims that in this conversation defendant admitted that he had told his son to come to Grand Rapids and select a boarding place, and that he would pay his board until he was twenty-one years old. On the part of the defendant it is claimed that he never agreed to pay for his board, or any part of it; that he never authorized his son to procure board from the plaintiff; and that he did not agree to pay any of the boy's board after he became twenty-one years of age. Now, as a matter of law, I charge you that a father is not ordinarily liable for the board furnished to his son, unless he agrees to pay the same; and I charge you that unless you find that the father told the son to pick out a good boarding house, and that he would pay his board, the father is not liable. That is, the defendant in this case is not liable. But should you find from the evidence in the case that the defendant did agree to pay his son's board, then he is liable, and the plaintiff should recover. The burden of proof to prove this agreement rests upon the plaintiff. She must satisfy

⁴ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 118.

your minds by a fair preponderance of evidence that, at the time this son came to her boarding house, he was authorized by the father to procure board upon the father's credit, and that she boarded the son, relying upon the father as the paymaster, and upon him alone."

This instruction fairly states the rule of law. The serious question, however, is whether there is a basis for a finding that the son had authority to bind the defendant for his board after he became 21 years of age. There is no proof in the record that the defendant agreed with plaintiff, or any one acting for her, to pay his son's board for any period whatever. The only evidence of any agreement to pay the son's board for any time is found in defendant's statement to plaintiff as testified to by her, which was, in substance, that defendant had agreed with his son to pay his board until he was 21. The payments for the son's board were made by remittances of the father to the son. ~~There was no privity between defendant and plaintiff, unless it be said that the promise of defendant to his son carried with it authority for the son to pledge his father's credit.~~ Such an interpretation of the testimony would be of doubtful accuracy at best, but, if it be adopted, that authority was clearly limited to the period covered by the promise to the son. In other words, if there was an agency created, it was a special agency, and any attempt to bind the defendant for the son's board after the latter reached his majority was in excess of the authority granted.

This is not a case in which the agent has been held out as having authority beyond that actually given to him. There was no communication whatever between the plaintiff and defendant, and, as the defendant during his son's minority sent the money to pay his board bills to the son, there is no evidence of any satisfaction of the alleged contract by which the latter undertook to bind him. The plaintiff's case rests finally upon the son's representations of his authority. That, under the circumstances of this case, an alleged principal cannot be bound by the false representations of an assumed agent as to his authority, is well settled. Mechem on Agency, § 100; Rice v. Peninsular Club, 52 Mich. 87, 17 N. W. 708; Swanstrom v. Improvement Co., 91 Mich. 367, 51 N. W. 941.

The judgment is reversed and a new trial ordered.

III. Parent's Liability for Child's Torts⁵

LESSOFF v. GORDON.

(Court of Civil Appeals of Texas, 1909. 124 S. W. 182.)

McMEANS, J.⁶ Suit by appellant, Adelia Lessoff, against appellee, S. P. Gordon, to recover damages for personal injuries sustained by appellant by reason of being run over by a cow belonging to appellee which was being driven on the streets of the city of Galveston by appellee's minor son. * * * The case was tried before the court without a jury, and after hearing the evidence the court rendered judgment in favor of defendant, and plaintiff appeals.

At the request of the plaintiff, the court filed its findings of fact, which are as follows: "Plaintiff and defendant are both residents of the city and county of Galveston, Tex. That the plaintiff is a widow, about 42 years of age, and earns her livelihood by means of sewing. That she has no other means of making a living. That on or about the 3d of September, 1908, she was run into and knocked down by a cow belonging to the defendant. * * * That as a result of the injuries sustained she suffered considerable pain, physical and mental. That since the injury she has been unable to do work of any character towards making a living for herself."

The court further finds the facts to be: "That the defendant, S. P. Gordon, was the owner of the cow which injured Mrs. Adelia Lessoff, the plaintiff. That the defendant had owned the cow for about four years, during which time the cow was never known to develop any vicious habits, but, on the contrary, was a gentle cow. That the defendant kept the cow at his residence. * * * That on the day of plaintiff's injuries the defendant, Gordon, was absent from home. That when he left home the cow was safely inclosed. That about 4 o'clock in the afternoon of September 3, 1908, some negro boys were playing baseball in a lot near the defendant's cow lot, when one of the boys knocked a ball into the defendant's cow lot. That one of the said negro boys climbed the fence into the said cow lot for the purpose of recovering the ball. That in leaving the cow lot the negro boy opened the gate, and the boy and the cow came out of the gate about the same time. That

⁵ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 121.

⁶ Part of the opinion is omitted.

a few minutes thereafter defendant's minor son, Herbert Gordon, who was playing near by with other boys, but not with the negro boys heretofore mentioned, saw the cow leave the lot, and immediately ran home and secured a horse, which he mounted and attempted to drive the cow back into the lot, and in doing this the cow traversed through several streets, in a trot, in the neighborhood, during which time the said cow hooked or butted the plaintiff, as heretofore recited. * * * That the defendant's son had no experience in driving cattle and testified that this was the first time that he had ever been on horseback. That defendant's son left his home in express violation of his mother's wishes; his mother, at the time of his leaving in pursuit of the cow, calling to him to come back. That his father was not at home at the time and had given the son no instruction in the premises. * * * That the defendant's son, Herbert Gordon, is 14 years of age and attends school. That he did not have charge of the cow and never attended her, except occasionally to give her some hay. He does not milk the cow. The boy lives at home with his father and does not work other than to do errands around the home. He does those things which his father tells him to do if he feels like it. It is not his duty to look after things about the place when his father is absent from home. Defendant owned the horse on which his son was riding. Defendant testified that, if the cow got out during his absence, it would not be a part of his son's duty to drive her home and back into the lot. * * *

Upon the foregoing findings of fact, the court concluded, as a matter of law, that the evidence disclosed no liability of appellee for the injuries sustained by appellant.

Appellant, by her second assignment of error, complains that "the court erred in concluding as a matter of law that there was no liability on the part of defendant to plaintiff for the injury she sustained by reason of the collision with the cow of defendant while being driven in the manner and at the time and place as shown by the evidence, and the court's findings of fact." In the proposition following she urges that "a father is liable for the torts of his minor son who is living with him and under his direction, when such tort is committed by the son while using such father's horse, in and about his father's business." Appellant contends that, while a father is not liable for the torts of his minor son by reason alone of such domestic relation, the facts in this case show liability on the part of appellee for the tort of his minor son upon the principle of master and servant, and that this case should be determined by the rules applicable to that relation.

It seems well settled that at common law the father is not liable for the torts of his child committed without his knowledge, consent, participation, or sanction, and not in the course of his employ-

ment of the child. *Ritter v. Thibodeaux*, 41 S. W. 492; *Chandler v. Deaton*, 37 Tex. 406; *Schouler, Dom. Rel.* § 263; 29 Cyc. 1665. If then the appellee can be held liable for the act of his son in causing appellant's injuries, the liability does not grow out of the relation of parent and child, but must be based on the relation of master and servant, and is governed by rules applicable to such relation. 29 Cyc. 1665. It is stated to be the universal rule that, whether the act of the servant be of omission or commission, whether his negligence, or even wrongful misconduct, occasion the injury, so long as it be done in the scope of his employment, his master is responsible in damages to third persons. And it makes no difference that the master did not give special orders; that he did not authorize, or even know, of the servant's act or neglect; for, even though he disapproved or forbade it, so long as the act was done in the scope of the servant's employment, he is none the less liable. *Schouler, Dom. Rel.* 490.

But the rule of the master's liability for the acts of his servant does not extend to unauthorized acts, not connected with, incident to, or within the real or apparent scope of the employment. If therefore the servant does an act not necessary to or arising properly from his service and the reasonable scope thereof, whereby an injury is inflicted upon the person of another, the servant alone is liable, for the master cannot be held in law to contemplate any extraordinary act of his servant not authorized directly or indirectly, and which is outside of and unnecessary to a proper performance of the service. The criterion for determining the master's liability in such cases is to ascertain if the act was done within the real or apparent scope of the authority of the master. *Rogers, Dom. Rel.* § 795.

The court, in its findings of fact, which are not challenged by the assignment of error, finds: That the act of appellee's son which resulted in injury to the appellant was done without the knowledge of the father and against the express wishes of his mother; that appellee had given the boy no instructions in the premises; that the boy did not have charge of the cow, and that he never attended to her, except to give her hay occasionally.

We think the evidence wholly insufficient to show that the acts of the boy were within the scope of any duty or service exacted of him by the appellee, or to show facts which authorize a judgment against appellee for the act of his son based on the relation of master and servant, and that under the facts found by the court judgment was properly rendered for appellee.

This conclusion relieves us from the necessity of passing upon the only other question raised by appellant's assignment of error. The judgment of the court below is affirmed.

BRITTINGHAM v. STADIEM.

(Supreme Court of North Carolina, 1909. 151 N. C. 299, 66 S. E. 123.)

Action by J. C. Brittingham against B. Stadiem and another to recover damages for injuries received by him while on business in the store owned by the female defendant, B. Stadiem, from a pistol shot wound inflicted by the 12 year old son and an employé of the defendants, while carelessly handling the pistol. Judgment was rendered against the defendants, from which they appealed to this court.

MANNING, J.⁷ If the feme defendant, Bettie Stadiem, is answerable to the plaintiff for the damages resulting from the tort alleged, then the defendant D. Stadiem, her husband, living with her at the time, is jointly liable. Revisal 1908, § 2105; Roberts v. Lisenbee, 86 N. C. 136, 41 Am. Rep. 450. The tortious act alleged having been committed by Moses Stadiem, the 12 year old son of the defendants, the first question presented is the liability of the defendants by virtue of this relationship. "Relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he approved such acts, or that the child was his servant or agent." Johnson v. Glidden, 74 Am. St. Rep. 795, in the note to which a large number of the decisions of the American courts are collected by Mr. Freeman; Mirich v. Suchy, 74 Kan. 715, 87 Pac. 1141; Chastain v. Johns, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958; Evers v. Krouse, 70 N. J. Law, 653, 58 Atl. 181, 66 L. R. A. 592; 21 Am. & Eng. Enc. 1057. Wherever the principles of the common law prevail this is the well-established doctrine.

If there were in this case nothing more than the relationship to connect the parent with the wrongful act of his child, we would be constrained to reverse the judgment and hold that defendants were not liable. The complaint, however, proceeds upon a two-fold theory, and evidence was produced at the trial to support it, to wit: (1) That the boy, Moses Stadiem, was the servant and employé of the defendant, doing work in the store as clerk, and the injury to plaintiff was caused by the negligent and careless act of this servant, while about his master's business and while doing an act he was directed to do. (2) That the defendant, as a part of her business, conducted a pawnbroker's shop, and received in pawn various articles, among them pistols, which she also carried in stock for sale, and that these dangerous weapons were carelessly and negligently permitted to lie on the counters and in the

⁷ Part of the opinion is omitted and the statement of facts rewritten.

windows of the store, within reach of a boy of the size of Moses Stadiem, and that he "fooled with them."

The immediate circumstances of the injury are thus described by the plaintiff: "I went into the store to pawn my watch. I was to receive \$7. The man went to get the money for me and laid it down on the counter, and, just as I was in the act of picking it up, a pistol went off. * * * I turned to see where the shot came from, and there was a boy standing in front of me with the smoking pistol in his hand. At the time I was shot, Stadiem grabbed the boy and told him: 'I have been telling you about fooling with pistols.'" The plaintiff further testified that the boy had been waiting on customers, and asked his father what he was going to let him have on the watch. Another witness for the plaintiff testified that he had seen the boy in the store, selling goods and handling them, and behind the counter, and that there were a lot of guns and pistols lying on the counters and in the windows, so that anybody that wanted to could handle them.

The boy Moses, testified: That a man came to pawn a pistol. Then plaintiff came in. "Before loaning the money, we wanted to see whether it was all right. I snapped it to see," and it fired. Phelps, another clerk in the store, stated: That, while he was making out the pawn ticket, he told the boy to bring the pistol to him, and, while he was bringing it, it fired; that the man who pawned it said it was not loaded; that he did not examine it, but laid it on the counter and was waiting on plaintiff. The evidence produced at the trial, as to the employment of the boy to aid in the work of the store as clerk, was sufficient to carry the case to the jury, and it was for them to determine the fact. *Wood on Master & Servant*, p. 584; *Perry v. Ford*, 17 Mo. App. 212.

Passing the sufficiency of the evidence to establish the additional relation of master and servant to that of parent and child, we will consider the duty of the defendant, the proprietor of the store, to the plaintiff, a customer, while in the store. In *Swinarton v. Le Boutillier*, 7 Misc. Rep. 639, 28 N. Y. Supp. 53, the duty is thus declared: "We hold, furthermore, that having invited the plaintiff into his store for his benefit, and having authorized and induced her to confide in the good conduct of his servants to whom, in the transaction of his business, he committed her, he thereby assumed the duty, by the exercise of reasonable care, of protecting her from injury by the misconduct of such servants, and that he is answerable to her for any injury she has sustained by such misconduct." In *Mattson v. Minn. & N. W. R. Co.*, 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, it is held: "The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the

end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article." The same doctrine is held by this court. *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Witsell v. Railway Co.*, 120 N. C. 557, 27 S. E. 125; *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298; *Horne v. Power Co.*, 144 N. C. 375, 57 S. E. 19; *McGhee v. Railroad*, 147 N. C. 142, 60 S. E. 912, 24 L. R. A. (N. S.) 119. See, also, *Galveston, H. & S. A. R. Co. v. Currie*, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367, and "subject note," where the American and English cases are collected and digested.

In *Cooley on Torts*, star page 539, the learned author lays down this generally accepted doctrine: "It is immaterial to the master's responsibility that the servant, at the time, was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and the injury which actually resulted is attributable to the servant's failure to observe the directions given him." In the case of *Dixon v. Bell*, 5 Maule & S. 198, the facts were that the defendant, being possessed of a loaded gun, sent a young servant girl to fetch it, with directions to a man named Leman, who had charge of it, to take the primings out, which was accordingly done. The girl presented it, in play, at the plaintiff's son and drew the trigger, when the gun fired and inflicted the injury for which damages were sought. Lord Ellenborough, C. J., said: "The defendant might and ought to have gone farther. It was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Leman was not sufficient. Consequently, as by his want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly, but I think the action is maintainable."

Applying these principles to the evidence in this case, it will be seen that the defendant was liable because of the negligent act of her servant while doing work within the scope of his employment, and that the defendant was negligent in intrusting to a servant of 12 years of age such a dangerous instrument as a pistol, without being careful to make it "innocuous." * * * The judgment is affirmed.⁸

⁸ Liability of child for his own torts, see *Young v. Muhling*, post, p. 282, and *Churchill v. White*, post, p. 285.

RIGHTS OF PARENTS AND OF CHILDREN

I. Parent's Right to Correct Child¹

McKELVEY v. McKELVEY.

(Supreme Court of Tennessee, 1903. 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991, 102 Am. St. Rep. 787.)

Action by Nellie McKelvey, by her next friend, against W. J. McKelvey and another. Judgment for defendants, and plaintiff appeals.

BEARD, C. J.² This is a suit instituted by a minor child, by next friend, against her father and stepmother, seeking to recover damages for cruel and inhuman treatment alleged to have been inflicted upon her by the latter at the instance and with the consent of the father. Upon demurrer the suit was dismissed, and, the case being properly brought to this court, error is assigned upon this action of the trial judge.

We think there was no error in this dismissal. At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect, and educate it. These rights could only be forfeited by gross misconduct on his part. The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted. Whatever redress was afforded in such case was to be found in an appeal to the criminal law and in the remedy furnished by the writ of habeas corpus. So far as we can discover, this rule of the common law has never been questioned in any of the courts of this country, and certainly no such action as the present has been maintained in these courts.

It is true that no less celebrated an authority than Judge Cooley, in the second edition of his work on Torts, at page 171, observes that "in principle there seems to be no reason it should not be sustained." No case, however, is cited in support of this text. In fact, the only case which the diligence of counsel has been able to find in which this particular question has been discussed is that of Hewlett v. George, Ex'r, reported in 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. It is there said: "So long as the parent is under

¹ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 124.

² Part of the opinion is omitted.

obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and of a sound public policy designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor children protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

The fact that the cruel treatment in this case was inflicted by a stepmother can make no difference, for, whether inflicted in the presence of the father or not, if the action could be maintained at all, he would be responsible for the tort. If inflicted in his presence, he alone would be responsible, nothing appearing to repel the presumption that it was the result of his coercion; if out of his presence, then he and she would be jointly liable for the wrong.

* * * Judgment is affirmed.³

FLETCHER v. PEOPLE.

(Supreme Court of Illinois, 1869. 52 Ill. 395.)

Mr. Justice LAWRENCE delivered the opinion of the Court.

This was an indictment against Samuel Fletcher and his wife, Ledia, for false imprisonment of Samuel Fletcher, Jr., the son of Samuel, Sr., and stepson of Ledia. The defendants were found guilty, and sentenced to pay a fine of \$300 each.

The instructions gave the law correctly to the jury, and so far as relates to Samuel Fletcher, we are of opinion the evidence sustains the verdict. It shows the wanton imprisonment, without a pretense of reasonable cause, of a blind and helpless boy, in a cold and damp cellar without fire, during several days of mid-winter. The boy finally escaped and seems to have been taken in charge by the town authorities. The only excuse given by the father to one of the witnesses who remonstrated with him was that the boy was covered with vermin, and for this the father anointed his body with kerosene. If the boy was in this wretched state, it must have

³ See, also, *Rowe v. Rugg*, 117 Iowa, 606, 91 N. W. 903, 94 Am. St. Rep. 318 (1902), which involved the right of a parent to delegate to another the right to correct the child—in this case the child's aunt. The court said: "While we are not prepared to hold that a parent may, without restraint, lawfully authorize any and all persons to administer physical punishment to his or her child, we see no reason why such authority may not be given under certain circumstances. For instance, if a child is temporarily placed in the care of some person, in whom the parent has great confidence, on account of relationship or otherwise, why may not authority to correct the child be delegated for the time being?"

been because he had received no care from those who should have given it. In view of his blind and helpless condition, the case altogether is one of shocking inhumanity.

Counsel urge that the law gives parents a large discretion in the exercise of authority over their children. This is true, but this authority must be exercised within the bounds of reason and humanity. If the parent commits wanton and needless cruelty upon his child, either by imprisonment of this character or by inhuman beating, the law will punish him. Thus, in *Johnson v. State*, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322, the court held the parents subject to indictment, because, in chastising their child, they had exceeded the bounds of reason, and inflicted a barbarous punishment. It would be monstrous to hold that, under the pretense of sustaining parental authority, children must be left, without the protection of the law, at the mercy of depraved men or women, with liberty to inflict any species of barbarity short of the actual taking of life.

In this case, however, the verdict against Ledia Fletcher was wrong. There is absolutely no evidence whatever against her. As to her, the judgment must be reversed. As to Samuel Fletcher, it is affirmed.

II. Custody of Children⁴

GILMORE v. KITSON.

(Supreme Court of Indiana, 1905. 165 Ind. 402, 74 N. E. 1083.)

Habeas corpus by R. H. Gilmore against Flora D. Kitson and others to obtain the custody of petitioner's infant daughter, Ruth Gilmore. From a judgment awarding the care and custody of the infant to the respondent Flora D. Kitson, the petitioner appeals.

MONTGOMERY, J.⁵ * * * The controlling facts shown by the evidence, briefly summarized, are as follows: Appellant is 32 years of age, and lives in Indianapolis, where he has lived all his life-time with the exception of 2 years. He is a linotype operator, has permanent and steady employment, and earns about \$100 per month. He was married June 20, 1900, and lived with his wife at his home until 11 months prior to her death, when, on account of failing health, at the request of her sister, his wife went to her sister's home, at Bloomington, where she remained until her death.

⁴ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 125, 126.

⁵ Part of the opinion is omitted.

May 5, 1904. Ruth A. Gilmore was born during wedlock on September 25, 1901. Appellee Flora D. Kitson and her mother waited upon appellant's wife during her last illness, except for eight weeks, when they had the assistance of a nurse. Appellant paid the nurse and the doctors, and sent to his wife and child, while at the home of appellees, money, gifts, and flowers. Appellant lives with his mother, a widow, and single sister, in a comfortable six-room house, situated in a good neighborhood. He smokes cigarettes and cigars, and drinks beer occasionally, but otherwise is of good habits, good moral character, good disposition, industrious, kind, and affectionate. His mother and sister are of good character, kind and loving disposition, fond of children, and desirous of caring for the child as a member of the family.

About one month before her death, appellant's wife made a will containing the following provision:

"I desire to acknowledge the great kindness shown me and my daughter Ruth during my last illness by my beloved sister, Flora D. Kitson, and her husband Herbert T. Kitson, to express my sincere appreciation of the love and devotion shown me by them in taking me into their home and caring for me during the last year of my life. During this time my daughter Ruth is become greatly attached to my said sister and her husband, and I know by their many acts of attention and kindness that they have become greatly attached to her and love her as their own child, and are willing and able to care for and educate and guide her in the way she should go.

"It is therefore my will and most earnest wish and desire that my beloved sister, Flora D. Kitson, have the care and custody of my only child, Ruth A. Gilmore, during the years of her minority.

"In expressing this will and desire I am not unmindful of my husband, the father of said child, but make this request for the disposition of my child because I believe it will be for the best interests of my child and result in her greatest comfort and happiness."

When appellant's wife was very near to death, appellees called in some neighbors, and in their presence, as well as the presence of the family, appellant's wife asked him to promise to give the custody of the child to Mrs. Kitson; but this he very kindly, but firmly, refused to do. During the funeral exercises Mrs. Kitson remained with the child, locked in a rear room of the house, and caused a policeman to be present for the purpose of preventing any effort to take the child from her, and she afterwards refused to allow appellant to take it from her house. After the death of Mrs. Gilmore, Mrs. Kitson was, without appellant's knowledge or consent, appointed guardian of Ruth A. Gilmore by the Monroe circuit court, upon a showing that the child had articles of personal property bequeathed to her by her mother, of the value of \$50.

Appellee Flora D. Kitson is a kind and affectionate woman,

strongly attached to the child; and her husband is a peaceable and kind man, and earns from \$200 to \$400 per month. They live in a comfortable home in Bloomington, and are in every way competent to be intrusted with the care of the child, and have no children of their own. They have radical views with regard to the use of tobacco and intoxicants, and, from studying magazine articles, have become believers in the hygienic theory of treatment of diseases. Appellant's wife was kept in a tent and given no medical treatment during her illness. An estrangement grew between appellant and appellees by reason of conflicting views with regard to the proper treatment of his wife, and a belief on his part that appellees were seeking to alienate her affections from him.

Both under the common law and the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be intrusted with their care, control, and education. *Jones et ux. v. Darnell*, 103 Ind. 572, 2 N. E. 229, 53 Am. Rep. 545.

The mother cannot, by testamentary provisions or otherwise, deprive the father of his right to the custody of their minor child after her death. *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375; *Stapleton v. Poynter*, 111 Ky. 264, 62 S. W. 730, 53 L. R. A. 784, 98 Am. St. Rep. 411; *State ex rel. v. Reuff*, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676; *Taylor v. Jeter*, 33 Ga. 195, 199, 81 Am. Dec. 202; *In re Neff*, 20 Wash. 652, 56 Pac. 383.

The appointment of the legal guardian was also ineffectual to deprive the father of his right to the custody of the child. *Dalton v. State*, 6 Blackf. 357; *Lee et al. v. Back*, 30 Ind. 148; *Bryan v. Lyon et al.*, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309; *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177.

This court has frequently said that, in settling disputed claims to the custody of an infant, the interest of the child is the paramount consideration. It is apparent from the record that the assumed force of this rule persuaded the trial court into the conclusion reached. We are not disposed to qualify or criticise that principle, but we cannot conceive that it should be invoked or enforced against a parent under no disabilities, unless he has forfeited his right by misconduct, or lost it by voluntary relinquishment or by long acquiescence in the care and custody of his child by another. The assumed welfare of the child does not clothe one person who may enjoy wealth or high social position with a commission to seize and hold the child of another less favored, and usurp parental rights, for the sole reason that he may be able to afford such child more of the artificial advantages of life. The most appropriate application of the principle obtains when the child in some proper way becomes a ward of the court. The parents, in a suit for divorce, or other proceeding, may properly confer jurisdiction upon the court and invoke its judgment with regard to the custody of

their minor children, and in such a case it can be said without qualification that the interests of such children shall be the paramount consideration. *Leibold v. Leibold*, 158 Ind. 60, 62 N. E. 627; *Joah v. Sheets*, 99 Ind. 328; *Bullock v. Robertson*, 160 Ind. 521, 65 N. E. 5; *Johnston v. Johnston*, 89 Wis. 416, 62 N. W. 181.

The state, upon its own motion, may, in the interest of a child, make application to a court to deprive a parent of its custody where such a parent has abandoned or forfeited parental rights by reason of moral turpitude, vicious habits, cruel and inhuman treatment, or other conduct forbidden by statute. *Van Walters v. Board, etc.*, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431. The principle of the welfare of the child may be applied to defeat the claims of a parent when he has voluntarily relinquished to others the custody and care of his child until the affections of the child and its foster parents have become so firmly interwoven that to sunder them would seriously mar and endanger the future happiness and welfare of the child. *Schleuter v. Canatsy et al.*, 148 Ind. 384, 47 N. E. 825; *Berkshire v. Caley*, 157 Ind. 1, 60 N. E. 696; *Fletcher v. Hickman*, 50 W. Va. 244, 40 S. E. 371, 55 L. R. A. 896, 88 Am. St. Rep. 862; *Bonnell v. Bonnell*, 61 Iowa, 199, 16 N. W. 91, 47 Am. Rep. 810; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *Enders v. Enders*, 164 Pa. 266, 30 Atl. 129, 27 L. R. A. 56, 44 Am. St. Rep. 598; *Sheers v. Stein*, 75 Wis. 44, 43 N. W. 728, 5 L. R. A. 781.

No such case is presented by this record. The father did not abandon the child or relinquish his rights, or otherwise abdicate his parental authority. Appellant expressly declined to release to appellees his right to the custody of his child when appealed to under the most pathetic circumstances. Appellees obtained physical possession of the child by reason of their relation to and care of the mother during her last illness, and retained it by a display of force. * * *

Appellees' claims to the custody of this child are not founded upon natural or legal rights, but only upon the superior advantages which it is assumed would be afforded the child by leaving it in their home and under their control. The facts shown by the evidence are not sufficient to require a court to exercise its discretionary power to intervene, and interfere with parental authority. We are not unmindful of the tender affection and generous impulses which inspired the acts of appellees, and fully appreciate the noble traits of mind and heart exhibited, but they cannot outweigh the sacred rights of a parent. Courts must not be tempted to interfere with the natural order of family life except in special cases of extreme urgency. In a case like this a court should not arrogate to itself the right to determine by its standards the welfare and benefit of the child, but should have a conscientious regard for the natural law, from which we learn that the father, as a rule, knows

far better what is good for his child than a court of justice can know.

Paternal control of the family has been a fundamental principle in the history of mankind, and its free exercise, restricted only in the interest of humanity and good morals, is essential to the highest development of the race. What influence more likely to lead to despondency and self-destruction than the unnatural separation of a parent from his child, and what greater stimulus to worthy ambition and noble endeavor on the part of a father than the care and companionship of his motherless girl? It is needless to elaborate argument. The father has not relinquished or forfeited his rights as a parent, and the faults found with his habits are not of such unusual and serious character as to disqualify him from discharging his parental duties, or to make him an unfit associate of his own child.

The court erred in awarding the custody of the child, Ruth A. Gilmore, to appellee Flora D. Kitson, and the judgment is reversed, with directions to vacate the same, and to enter judgment for the delivery of said child to appellant.⁶

HUSSEY v. WHITING.

(Supreme Court of Indiana, 1896. 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220.)

Proceeding by habeas corpus by Charles C. Whiting against Richard L. Hussey. Judgment for petitioner, and defendant appeals. Affirmed.

HACKNEY, J. This was a proceeding by habeas corpus for the custody of Ray Hussey, a little girl 13 years of age, and was instituted by the appellee, her maternal grandfather, against her father, the appellant. The decree of the lower court was in favor of the appellee and the appellant submits the case to this court by his appeal upon the evidence.

It may be fairly said that, by a clear preponderance of the evidence, either party entertains a deep affection for the child, and might reasonably be intrusted with her moral training. Since the death of her mother, some six years before the disagreement which resulted in this proceeding, she resided with her grandparents, who were possessed of a large, comfortable home, and lands of the value of \$20,000 or more, and were willing and prepared to render every care and comfort necessary to the welfare of the child. During the period mentioned the appellant continued, and still is, a widower, with little means above his indebtedness, but with an

⁶ See, also, Stapleton v. Poynter, 111 Ky. 264, 62 S. W. 730, 53 L. R. A. 784, 98 Am. St. Rep. 411 (1901). And compare Hussey v. Whiting, *supra*.

average income of \$50 per month from his business. Until he took the child from her grandparents, he made his home with them, but his business, that of traveling salesman, required him to be absent from five to six days each week. He paid for his own boarding, and supplied most of the material for clothing the child; but her boarding and care, and the making of her clothing, were supplied by her grandparents. The appellant and the child took up their home with the appellee, pursuant to a request from Mrs. Hussey, while upon her deathbed, that they should have a home with, and that the child should be raised by, the appellee and his wife.

The parties differ as to the conversation at the time of this request, as to whether the appellant simply acquiesced in the request and the appellee's promise, or whether he declined to "give" the child to her grandparents. But there is no disagreement about the fact that the appellee and his wife cared for the child as a member of their family, and became greatly attached to her, and that the appellant took her from them, not by reason of any neglect or mistreatment of her, but because he and his mother-in-law at times disagreed, and had bitter words as to his own relations to the household, and because he, without just cause, thought that the child was becoming estranged from him by the influence of her grandmother. When she was taken from the appellee's home, she was taken to the home of the appellant's married sister, who lived in the town of Princeton, where the appellee lived also. The sister, Mrs. Eby, owned and lived in a house of four rooms. Her husband labored at \$1.25 per day. There were four members of her family, and a boarder five days in the week, when the appellant and his daughter took up their new abode with her. Mrs. Eby was a kind-hearted woman, affectionate with children, and favorably disposed towards the little girl. She performed all of the duties of her household without a servant, and, while her circumstances were not the best, she was a fit woman to have the care and moral training of the child. Mrs. Hussey had died of consumption, and the child was delicate, and evidently predisposed to that disease.

Ordinarily the father is entitled to the custody of his minor children. This was the rule of the common law, and is affirmed by statute in this state; but, where the welfare of the child is retarded by the custody of the father, an exception to the ordinary rule exists. The interests of society and the established policy of the law make the welfare of the child paramount to the claims of a parent. *Jones v. Darnall*, 103 Ind. 574, 2 N. E. 229, 53 Am. Rep. 545; *Sheers v. Stein*, 75 Wis. 44, 43 N. W. 728, 5 L. R. A. 781, and note; *Joab v. Sheets*, 99 Ind. 332; *Schouler, Dom. Rel.* § 248; *U. S. v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256; *Bryan v. Lyon*, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 304. The oral agreement, express or implied, that the appellee should have the custody of the child during her infancy, would not preclude the appellant

from reclaiming her custody. *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177; *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672. The conclusion of the trial court, therefore, must have been reached upon the theory that the welfare of the child would be best promoted by remanding her to the custody of the appellee; and it remains for us to determine, upon the facts stated, whether that view of the case is supported.

Considering the delicacy of her health, the care and attention she requires on that account, the comforts of the spacious home of her grandparents, their relationship to and affection for her, the understanding of her health, disposition, and habits, acquired during the six years they have had the care of her, present a very strong claim in favor of their continued custody of her. The father's situation and business afford her no home with him, and, at best, from his standpoint, he can but supply her a home and its comforts by purchase, and with but little of his society. The home which he claims to be not less conducive to the welfare of the child than that from which he took her is, no doubt, modest and reasonably comfortable under the circumstances; but certainly Mrs. Eby's obligations to her own immediate family, including her two children, would not afford her the time to bestow careful attention to the needs and wants of the child, and the crowded condition of her home of four rooms would certainly not be so conducive to the health of the child as that of her grandparents.

The conclusion of the trial court was not a mere discrimination between the luxuries of wealth on the one side and the modest comforts of an ordinary home on the other, nor was it a simple denial of the right of a father to have the care, custody, and training of his minor child. It was a recognition of the fact that a child requiring unusual care could probably not receive it, and that her father sought to remove her, not to his own custody, but to that of another whose situation in life was not so conducive to the health and general welfare of the child as that of her grandparents.

The decree of the circuit court is criticised by counsel because of its having provided that the appellant should "at proper times" be permitted to visit his child, without defining the phrase "proper times." The criticism, we presume, is made upon the assignment of error that "the court erred in overruling the appellant's motions to modify the judgment." There were numerous motions to modify the judgment, severally filed and severally overruled, some of which were properly overruled, and it is not even claimed in argument that all were improperly overruled. There is, therefore, no available error. The judgment is affirmed.⁷

⁷ Accord: *McDonald v. Stitt*, 118 Iowa, 91 N. W. 1031 (1902); *Stringfellow v. Somerville*, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623 (1898); *State v. Anderson*, 89 Minn. 198, 94 N. W. 681 (1903).

As to effects of agreements as to custody of child, see *Carpenter v. Car-*

WARD v. WARD.

(Court of Civil Appeals of Texas, 1903. 34 Tex. Civ. App. 104, 77 S. W. 829.)

Proceeding between W. M. Ward and Ollie Ward. From a judgment for Ollie Ward, W. M. Ward appeals.

SPEER, J.^s This is a contest between the paternal grandfather, upon the one hand, and the mother upon the other, over the custody of an infant—a boy 4 years of age. The trial court awarded the custody to the mother, and while we are loath to disturb that judgment, yet a just appreciation of the rights of the minor, we think, compels us to remand the cause. Appellant pleaded, among other things, that the mother of the infant had “a bad reputation for chastity, truth, veracity, and honesty,” and the trial court sustained a special exception to such allegation, and refused to hear evidence in its support. A parent’s claim to the custody of an infant is of course ordinarily superior to that of any other person, but it is not alone to the right or wish of the parent we are to look in determining such question. Such right is not absolute. The interest of the child is the first consideration, and, if such parent is for any reason an unsuitable person to have its care, the custody should be awarded elsewhere. If the mother in this instance is a woman of bad reputation in the particulars mentioned, that fact should be considered by the court or jury in determining the award. A mother’s reputation in these respects might be so notoriously bad as to render it altogether out of the question that she should be permitted to rear her child when a better home is offered it. We have nothing to do with the weight of the proposed testimony in this case, but merely rule that the allegation should not have been stricken out, and that evidence should have been admitted in its support. * * *

For the error discussed, we reverse the judgment and remand the cause.

penter, 149 Mich. 138, 112 N. W. 749 (1907); Hibbett v. Baines, 78 Miss. 695, 29 South. 80, 51 L. R. A. 839 (1900); Fletcher v. Hickman, 50 W. Va. 244, 40 S. E. 371, 55 L. R. A. 896, 88 Am. St. Rep. 862 (1901); Norval v. Ziusmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. St. Rep. 500 (1898).

Right to direct religious training, see *In re Jacquet*, 40 Misc. Rep. 575, 82 N. Y. Supp. 986 (1903). And see *State ex rel. Flint v. Flint*, 63 Minn. 187, 65 N. W. 272 (1895).

^s Part of the opinion is omitted.

III. Parent's Right to Child's Services and Earnings⁹

BIGGS v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, 1909. 91 Ark. 122, 120 S. W. 970.)

Action by Sam Biggs, by his next friend, Sallie Biggs, against the St. Louis, Iron Mountain & Southern Railway Company, to recover wages earned by the infant plaintiff in the employ of the defendant. The action was instituted before a justice of the peace, and judgment for \$108.25, wages and penalty, recovered. From this judgment, defendant appealed to the circuit court. On the trial in the circuit court, it was shown that Sam Biggs was 16 years old, living with his mother, Sallie Biggs, on a small farm. Through the farming season, he worked on the farm, but at other times he worked for other people, making his own contracts, collecting his wages, and retaining his earnings as his own property. This was done with his mother's knowledge and without any objection on her part, though it did not appear that she gave express consent thereto. In August, 1907, he worked two or three days for defendant and was then discharged. In demanding his wages, he was given, by the foreman, an identification ticket for the amount due him, \$3.50, and told to present it to the agent at Delaplaine. He applied to the agent for his money, but the agent claimed he had not received it. After several applications he instituted this suit, in October, 1907. After the judgment was obtained in the justice's court, an agent of defendant paid Sallie Biggs \$5.10, taking from her a receipt for the amount, in which it was recited that the amount was "in full for wages and interest on the same due my son from the railway." The circuit court directed a verdict for defendant, and from the judgment entered thereon plaintiff appeals.

FRAUENTHAL, J.¹⁰ * * * It is contended by the defendant that, inasmuch as Sammy Biggs was a minor, his wages belonged to his mother, and that it had paid to her the amount of such wages, as evidenced by said receipt, and that therefore there was nothing due for said wages at the time of said trial in the circuit court. It is true that as a general rule the father is entitled to the services and earnings of his minor child, and that the widowed mother is entitled to these services and earnings to the same extent as the father. That is founded on the universal right of the parent to the custody and control of the child and his duty of maintenance and education

⁹ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 127.

¹⁰ Part of the opinion is omitted and the statement of facts is rewritten.

of the minor child. But the parent may permit his minor child to make his own contract, and to receive and own his wages. The parent has the right to give to his infant son his time and the fruits of his labor, and in such case the minor is under the law entitled to such earnings. The parent may relinquish his right to the services and earnings of the child expressly, but this relinquishment may also be implied from the circumstances. And this relinquishment may be found to have been made where the parent allows the child to make his own contracts, and to collect and retain his earnings. *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406; *Fairhurst v. Lewis*, 23 Ark. 435; *Vance v. Calhoun*, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111; *Smith v. Gilbert*, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. (N. S.) 1098; *Kansas City, P. & G. Ry. Co. v. Moon*, 66 Ark. 409, 50 S. W. 996; *Rodgers on Domestic Relations*, § 485; 29 Cyc. 1626; *Dierker v. Hess*, 54 Mo. 246. And where the parent has thus relinquished his right to the earnings of the minor, the right of action to recover such wages is in the child, and not in the parent; and such right of the child continues until it is revoked. This relinquishment by the parent of the minor's services and earnings may be revoked by the parent. *Vance v. Calhoun*, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111; *Rodgers on Domestic Relations*, § 485; 29 Cyc. 1627. But where the parent has permitted the child to contract for himself, and to receive his wages, he cannot revoke this license after the wages have been earned so as to acquire rights in the wages already earned. Under such circumstances the parent is precluded from asserting a claim to such wages. *Rodgers on Domestic Relations*, § 487; *Torrens v. Campbell*, 74 Pa. 470; *Campbell v. Campbell*, 11 N. J. Eq. 268.

In the case of *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865, Lurton, J., says: "The father may permit the minor to take and use his own earnings. This is called emancipation, and emancipation will be a defense to the father's suit for the minor's wages. It may be express or implied, * * * for the whole minority or for a shorter term. * * * Emancipation will not enlarge the minor's capacity to contract; it simply precludes the father from asserting his claim to the wages of his child. If one employ a minor with notice of the nonemancipation of the infant, it will be no defense to the father's suit for the wages that the child has received them. On the other hand, payment to the father will be no defense to the minor's suit, if the employer knew of the fact of emancipation." See, also, note to case of *Wilson v. McMillan*, 35 Am. Rep. 117.

In the case at bar we are of the opinion that there was sufficient evidence to go to the jury for that body to pass on the question as to whether the parent in this case had given to the minor son the right to make this contract for his labor and collect and appro-

priate to his own use the earnings arising from such labor. If she did, then the son had a right to enter suit therefor, and the mother could not then revoke her license to him to have such earnings so as to collect the same herself and deprive him of the right to recover them. In this case the mother consented to, and did, act as next friend for the minor, and did as such next friend enter suit for the wages in the name of, and for the benefit of, the minor, and thus recognized his right to recover same for himself. The defendant had knowledge of this by the institution of this suit and the recovery of the judgment before the justice of the peace. After this judgment was thus recovered, the defendant with this knowledge made payment to the parent, and thereafter pleads such payment against the suit of the minor. If Mrs. Sallie Biggs had emancipated her son to make the contract for the wages and to collect same, she had no right thereafter to revoke that license as to these earnings, and collect them. And under such circumstances a payment by defendant to her would not be a defense to this suit. Mrs. Sallie Biggs as next friend instituted this suit for the minor. As such next friend she had no authority, either to compromise this case, or to receive any money belonging to the minor. The minor had recovered judgment against the defendant for \$108.25, and she received therefor \$5.10. She could not, as next friend, defeat the minor by any such compromise or settlement. Her only and entire authority as next friend was to prosecute the suit, and in the progress of the case she could take no action that would be binding on the minor, except with the consent of the court. In this case she appears to have made receipt in her own name and right, and not as next friend; but, if the receipt could be considered as made by her as next friend, it would not be a defense to this action. *Evans v. Davies*, 39 Ark. 235; *Rankin v. Schofield*, 70 Ark. 83, 66 S. W. 197; *Wood v. Claiborne*, 82 Ark. 514, 102 S. W. 219, 11 L. R. A. (N. S.) 913, 118 Am. St. Rep. 89; 22 Cyc. 661-663.

It is next urged by the defendant that the plaintiff did not request his foreman, or the keeper of his time, to have the money due him, or a valid check therefor, sent to a station named by him where a regular agent was kept, and for that reason is not entitled to any penalty. This suit for penalty was brought under the act of the General Assembly of Arkansas approved April 24, 1905, and which amends section 6649 of Kirby's Dig. Acts 1905, p. 538. That act makes the above request or notice necessary to a recovery of a penalty. *Wisconsin & Ark. L. Co. v. Reaves*, 82 Ark. 377, 102 S. W. 206; *St. L., I. M. & S. Ry. Co. v. Bailey*, 87 Ark. 132, 112 S. W. 180; *St. L., I. M. & S. Ry. Co. v. McClerkin*, 88 Ark. 277, 114 S. W. 240. But the evidence in this case tended to prove that the foreman at the time of the discharge told the plaintiff that the money due him would be sent to the depot agent at Delaplaine, and that the plaintiff agreed to that place for receiving payment.

This was equivalent to a request on the part of plaintiff to have the money due him sent to that station.

The above questions were controverted questions of fact, and were within the province of the jury to determine. Under proper instructions there was sufficient evidence adduced in this case to sustain a verdict of the jury in favor of the plaintiff, should such a verdict have been returned. The court, therefore, erred in directing a peremptory verdict in favor of the defendant. The judgment is reversed, and the cause remanded for a new trial.

IV. Emancipation of Children¹¹

ROUNDS BROS. v. McDANIEL.

(Court of Appeals of Kentucky, 1909. 133 Ky. 669, 118 S. W. 956, 134 Am. St. Rep. 482.)

CARROLL, J.¹² This case presents the interesting question: What acts and conduct of a father will constitute an emancipation of his minor child so as to deny the father the right to recover the child's wages during his minority?

The mother of Byrne McDaniel died in 1900, when he was about 12 years old, leaving his father, the appellee, A. J. McDaniel, with six children to care for. The father, who was a poor but kindly disposed man, a carpenter by trade, did not own any property, and found it necessary to place the other children—all of whom were younger than Byrne—in orphan homes; but after doing so he aided in their support. After this the father and Byrne boarded with a sister of the father, and for two or three years thereafter Byrne worked at different places, earning a few dollars a week, which he contributed towards his support. In 1902 Byrne, who was then about 14 years old, commenced to work for appellant, Rounds Bros. They paid him small wages in the beginning, but, finding him to be an industrious, sober, well-behaved, and capable boy, gradually increased his compensation, until at the time this suit was brought in 1907 he was receiving some \$8 or \$10 a week. During the first two years that he worked for them he lived with his father at his aunt's, and contributed all or the greatest part of his wages towards paying for his board and clothing.

In 1904, Byrne becoming dissatisfied with the accommodations received at his aunt's, left her house and procured board and lodg-

¹¹ For discussion of principles see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 128-131.

¹² Part of the opinion is omitted.

ing elsewhere. The evidence does not disclose any substantial reason why Byrne left the home of his aunt, but he assigned as a cause for so doing that the accommodations there were not as comfortable as he desired, and that he could not get his meals when he wanted them. After he left his father did not contribute anything toward his support or maintenance or expend anything in his behalf. In fact, he did not, after leaving his aunt, need the assistance of his father, as he was earning sufficient money to take care of himself. His father did not object to his leaving home, nor did he make any provision or arrangement for another home for him, although it cannot be said that his acts or conduct or treatment of Byrne furnished any sufficient reason why Byrne should have abandoned the home provided for him by his father. His father was at all times aware of the fact that Byrne was working for the Rounds Bros., and knew that from 1904 to 1906 they paid him his wages, and that he was expending them for his own use and benefit; but he did not object or make any demand that the wages be paid to him until April, 1906, when he notified Rounds Bros. that they must pay him what the boy earned. This they declined to do, and in 1908, he brought this action to recover the amount Byrne earned after he notified the Rounds Bros. to pay the wages to him.

The lower court rendered a judgment in favor of the father against the Rounds Bros. for the amount of the boy's wages after the notification, less the sum expended during this time by Byrne for board and clothes. It may be here stated that, if the father had not emancipated his son and was entitled to his wages, no just complaint could be made of the judgment. Having the view the lower court did of the law of the case, it was correctly held that there should be deducted from the wages received by the son the amount necessary to defray his expenses. *Culberson v. Alabama Construction Co.*, 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411, 9 Am. & Eng. Ann. Cas. 507. From the judgment the Rounds Bros. prosecute this appeal, and ask a reversal upon the ground that the father had emancipated his son, and therefore was not entitled to recover his wages, and in this insistence they are joined by Byrne. The father's contention is that the facts before stated are not sufficient to amount to an emancipation of his son, and consequently he was entitled to recover from the Rounds Bros. the boy's wages after he notified them that he claimed them. He also makes the further point that even if it should be held that, by permitting his son to leave home and earn his own living, he impliedly emancipated him, yet he had the right at any time during the child's minority to revoke this constructive emancipation and resume parental control and authority, and that, after he had so revoked it by notifying the Rounds Bros. that he claimed his son's wages, the status of parent and child was re-established the same as if there had never been any emancipation.

We have in this state no statute upon the subject under consideration, nor has the question ever been directly decided by this court; but the subject of parent and child, and the reciprocal rights, duties, and obligations of each, has furnished so much interesting matter for text-book writers, and has so frequently been considered by courts of other jurisdictions, that there is ample precedent and authority, both ancient and modern, from which to gather and formulate the general rules of law applicable to this relation. But this case presents some features of the law that are not so well settled, and concerning which there is conflict of authority. The duties and obligations of parent and child are, in a sense, at least reciprocal. Upon the parent is imposed by nature, as well as law, the obligation of supporting and caring for his offspring. * * * From this duty resting upon the parent comes the right to the services of the child during his minority, intended to be at least in some measure compensation for the care and attention bestowed upon the child in infancy; and this right of the parent to the services of the child during his minority is everywhere recognized. Jones v. Tevis, 14 Ky. 25, 14 Am. Dec. 98; L. & N. R. R. Co. v. Willis, 83 Ky. 57, 4 Am. St. Rep. 124; Illinois Central R. Co. v. Henon (Ky.) 68 S. W. 456; Blackstone, Commentaries, vol. 1, p. 454; Schouler on Domestic Relations, p. 334; Tyler on Infancy & Coverture, p. 200; 29 Cyc. 1623; 21 Am. & Eng. Ency. of L. p. 1039.

It is equally well settled that the parent, although entitled to the services and earnings of his minor child, may relinquish or surrender this right: First, by failing to provide for his child a home if he is able to do so; second, by such ill treatment, neglect, or cruel conduct as forces the child to abandon his home; third, by becoming so degraded or dissolute a character that his child cannot in morals or decency live with him; and, fourth, by emancipating his child. And if, in this case, the father had failed to provide a reasonably comfortable home for Byrne, or if he had treated him in a cruel or inhuman manner, or if he had so grossly neglected his parental duties as to cause him to leave his home, or if his life was so unworthy or discreditable that his son could not in decency or self-respect longer continue to recognize his authority, we would have little difficulty in reaching the conclusion that the father could not, after driving him away, or by his acts or conduct forcing him to shift for himself and make his own living, thereafter lay claim to his earnings. All the books are agreed upon this point, and indeed, in the absence of authority, we could have no doubt that under a state of case like this the father could not have the assistance of the courts to aid him in securing the services or wages of his child whom he had compelled by neglect, cruel treatment, or dissolute habits to secure another home. 29 Cyc. p. 1627; Godfrey v. Hays, 6 Ala. 501, 41 Am. Dec. 58; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Swift & Co. v. Johnson, 138

Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; Tyler on Infancy & Coverture, p. 200.

But the facts of this case do not warrant us in putting our decision upon any of these grounds, and so, if the judgment below is to be reversed, it must be because the father had emancipated his son. The doctrine of "emancipation," looking at it from a legal standpoint, is a recognition of the right of the parent to relinquish control and authority over his child to whose custody and service he is entitled; or to surrender, if he so elects and desires, to his minor son, who is capable of making his own living, the right to do so, and the privilege of receiving the wages that he earns. When this right of emancipation has been granted, it follows as a matter of course that the person for whom the child labors may pay him his wages, and that the child may do with them as he pleases. In other words, when a child has been emancipated, he occupies the same legal relation towards the parent as if he had arrived at full age. The legal duty of the parent to maintain and support him and defray his necessary expenses is extinguished, and so is the right of the parent to claim the services and wages of the child.

There are two kinds of emancipation that may be termed "express" and "implied." We should say that an "express emancipation" takes place when the parent freely and voluntarily agrees with his child, who is able to take care of and provide for himself, that he may go out from home and earn his own living and do as he pleases with his earnings, or when he willingly transfers to another the custody and keeping of his child without reference to his age. Where the emancipation is expressly agreed upon, the parent cannot afterwards renounce or set aside the agreement. He is bound by it to the same extent as he would be by any other contract freely entered into. The parent cannot, after deliberately surrendering parental control or relinquishing the right to another, reclaim the services of his child. An "implied emancipation" results when the parent, without any express agreement, by his acts or conduct impliedly consents that his minor son may leave home and shift for himself, have his own time, and the control of his earnings, and it may be inferred from and shown by circumstances. But where the child leaves home and goes out to make his own living under the assumption that his parent has emancipated him, his rights to his services and earnings are not absolute, as in the case of an express emancipation, and the parent may, by taking timely action, resume parental authority and reclaim the services of his child, but he must not delay until his implied emancipation has ripened into an express relinquishment, or wait until it would be hurtful to the best interest of the child to interfere with his individual aims and plans. It should, however, be kept in mind that whether or not the father emancipates his minor child rests with the father, and not with the child. The father may by his acts or

conduct relinquish parental control and authority, but the child of his own volition, in the absence of mistreatment or other like cause, cannot sever the relation so as to deny the father the right to his services and wages during his minority.

Contenting ourselves with these broad statements of general principles, we will proceed to inquire whether the facts of this case authorize us in holding that the father had emancipated his son. After Byrne had reached an age when he could make his own living, and was mentally and physically able to do so, his father voluntarily consented that he might leave his home, and continue in the employment of the Rounds Bros. for whom he had been working, and for something like two years he remained in their services, with the knowledge and consent of his father. During this time he received his own wages, and made such disposition of them as he desired. That he was an industrious, economical, and capable boy, there is abundant evidence. He had the respect and confidence of his employers, and in a business way was rapidly advancing. His father did not object to his employment until 1906, or demand his wages until that time. He did not request him to return to his home, nor did he manifest any particular interest or concern in his welfare. He seemed to recognize that his son was well situated and comfortably provided for, and that his usefulness was being promoted by the service he was engaged in and the interest his employers were manifesting in his welfare, and so he was willing to give him an opportunity to make his own way in the world.

In our opinion these facts were not sufficient to establish an express emancipation, such as the parent could not afterwards revoke or set aside; but they do show the son left home under circumstances that amounted to an implied emancipation. But, when the appellee attempted to resume parental control and authority after the expiration of more than a year, it was too late to reclaim the right. In this time the interest and welfare of the child had become an important factor in determining the rights of the parties. In judging a case like this, the court will not look exclusively to the rights of the parent, but will consider what is best for the child. The father, when his child was in some measure at least a burden to him, voluntarily allowed him to go out and care for himself, and after the child, prompted by prudent and industrious motives, had become more than self-sustaining, sought to withdraw the consent he had given. To permit him to do so would, under the circumstances of this case, be detrimental to the best interest of the child. To deprive the boy of his wages or force him to abandon his employment would seriously check his aspirations and impair, if not destroy, the fine prospects for future success that were opening up to him by reason of his attentive, honest, and sober habits.

We do not wish to extend this doctrine of implied emancipation to cases which do not justify its fullest application, and do not

mean to hold that every time a child who is old and strong enough to work becomes tired of or dissatisfied with his home he may leave, although without objection on the part of his parents, and live at some other place and work for other persons, and thereby sever the obligation he owes to his parents and destroy their right to his services and wages. Minor children cannot in this way cancel the duty they are under to the parent, who by acting promptly may reclaim the services of the child and the right to his earnings; but the parent must interpose his authority within a reasonable time. When a father gives freedom to a grown boy and tells him, in effect, if not in words, to go out and make his own living, and be his own man, and the boy, acting on this implied consent or direction, does commence for himself the battle of life, and is successfully meeting all its requirements, the father will not, unless he acts in seasonable time, be permitted to reclaim the boy's services or resume the parental authority he surrendered. * * * Judgment reversed.¹⁸

V. Action by Parent for Injuries to Child¹⁴

NETHERLAND-AMERICAN STEAM NAVIGATION CO. v. HOLLANDER.

(Circuit Court of Appeals of United States, Second Circuit, 1894. 59 Fed. 417, 8 C. C. A. 169.)

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Morris Hollander against the Netherland-American Steam Navigation Company for injuries to his minor child, brought in the Supreme Court of the state of New York, and removed therefrom by defendant. Verdict and judgment for plaintiff. Defendant brings error.

WALLACE, Circuit Judge.¹⁵ This is a writ of error by the defendant in the court below to review a judgment for the plaintiff rendered upon the verdict of a jury. It was proved upon the trial that the plaintiff and his daughter, the latter being of the age of about

¹⁴ See, also, *Porter v. Powell*, ante, p. 168; *Smith v. Gilbert*, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. (N. S.) 1098 (1906).

Effect of emancipation on right to recover for injuries to child, see *McCarthy v. Boston & L. R. Corp.*, post, p. 200.

¹⁵ For discussion of principles see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 132-134.

¹⁵ Part of the opinion is omitted.

five years, were passengers on the defendant's steamship Amsterdam, on a voyage from Rotterdam to New York, in September, 1891; that while they were walking upon the deck of the vessel an iron gate fell on the child, breaking her arm; that the plaintiff had employed a surgeon, and had taken the child to the hospital every fortnight for about six months after her injury; that he had incurred expenses for surgical treatment and medicines; that since the accident—a period of something over a year before the trial—the child had suffered from her injuries, and had not been able to use her arm as she did before the accident; that she continued to have restless nights, and had no one to take care of her but the plaintiff. The evidence tended to show that the child's injuries were caused by the negligence of the defendant. No testimony was introduced to show that the child had ever rendered any services for the plaintiff, or that she was capable of doing so.

The exceptions taken upon the trial, and the assignments of error which have been argued at the bar, raise the questions (1) whether the action was maintainable either for expenses or for loss of services; and, (2) if maintainable for the loss of services, whether there was any evidence which justified the trial judge in instructing the jury that they might award damages for prospective loss of services.

A father whose infant child has been injured by the tort or negligence of a third person has a right of recovery to the extent of his own loss. He cannot recover for the immediate injury to the child. His action rests upon his right to the child's services, and upon his duty of maintenance. When he is deprived of the right, or put to extra expense in fulfilling the duty, in reason and justice he ought to be permitted to have recourse to the wrongdoer for indemnity. He is entitled to be indemnified for his expenses necessarily incurred in the cure and care of the child, and for the loss of the child's services, past and prospective, during minority, consequent upon the injury. By some authorities the loss of service has been regarded as the foundation of the action; and the English courts, influenced by this strict view of the gravamen of the action, have decided that a father has no remedy, even for his expenses, where the child is of such tender years as to be incapable of rendering any services. The authorities in this country approve a more liberal and more reasonable doctrine, and, basing the right of action upon the parental relation, instead of that of master and servant, allow the father to recover his consequential loss, irrespective of the age of the minor. *Dennis v. Clark*, 2 *Cush.* (Mass.) 347, 48 *Am. Dec.* 671; *Cuming v. Railroad Co.*, 109 *N. Y.* 95, 16 *N. E.* 65; *Clark v. Bayer*, 32 *Ohio St.* 300, 30 *Am. Rep.* 593; *Durden v. Barnett*, 7 *Ala.* 169; *Sykes v. Lawlor*, 49 *Cal.* 236. * * * The judgment is affirmed.

McCARTHY v. BOSTON & L. R. CORP.

(Supreme Court of Massachusetts, 1889. 148 Mass. 550, 20 N. E. 182, 2 L. R. A. 608.)

Action by Dennis McCarthy against the Boston & Lowell Railroad Corporation, for damages incurred by loss of earnings of plaintiff's minor son, in consequence of injuries received by him and caused by defendant's negligence. Judgment for defendant, and plaintiff excepts.

C. ALLEN, J. The facts disclosed in the present case were sufficient, if taken by themselves alone, to warrant the jury in finding an implied emancipation by the plaintiff of his son, which would cut off the father's right to collect and have the son's earnings, or to maintain an action of tort founded on the loss of the son's services. Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Wodell v. Coggeshall, 2 Metc. 89, 35 Am. Dec. 391; Abbott v. Converse, 4 Allen, 530, 533; Dumain v. Gwynne, 10 Allen, 270, 272; The Etna, 1 Ware, 462, Fed. Cas. No. 4,542; Stansbury v. Bertron, 7 Watts & S. (Pa.) 362.

But the plaintiff contends that he did not in his own mind intend to emancipate his son, and the only question presented by the bill of exceptions is whether the plaintiff's undisclosed intent was a material element to be considered. If it was material, no doubt the plaintiff might testify to it directly. But we think it was not material. If a father drives his minor son out of doors, and turns him upon the world to shift for himself, and then sues for his wages, he cannot be heard in court to say that in his own mind he nevertheless retained the intention of claiming them. Emancipation is a practical thing, and may be proved by conduct and acts; and the father's secret intent, contrary to the effect of his acts, could not affect the son's right. By way of illustration, see West v. Platt, 127 Mass. 367, 372, and cases there cited; Ford v. Ford, 143 Mass. 577, 578, 10 N. E. 474; O'Donnell v. Clinton, 145 Mass. 461, 463, 14 N. E. 747.

The father's claim to recover damages for a personal injury to the son rests on the same ground as a claim to recover for his wages. He had forfeited his rights by his acts. Exceptions overruled.

SORRELLS v. MATTHEWS.

(Supreme Court of Georgia, 1907. 129 Ga. 319, 58 S. E. 819, 13 L. R. A. [N. S.] 357.)

Action by J. M. Sorrells against C. R. Matthews, a teacher of a public school, for damages for expelling plaintiff's children from the school. There was judgment dismissing the complaint, and plaintiff brings error.

FISH, C. J.¹⁶ One ground of the motion to dismiss the petition was that it set forth no right of action in the plaintiff. In our opinion this ground was well taken, and therefore the necessity of dealing with any other question raised by the record is obviated. In no case can a father maintain an action for a wrong done to his minor child, unless the father has incurred some direct pecuniary injury therefrom, in consequence of loss of service, or expense necessarily consequent thereon. *Bell v. Wooten*, 53 Ga. 684; *Central Railroad Co. v. Brinson*, 64 Ga. 475; *Frazier v. Georgia Railroad Co.*, 101 Ga. 70, 28 S. E. 684; *Hurst v. Goodwin*, 114 Ga. 586, 40 S. E. 764, 88 Am. St. Rep. 43.

Civ. Code 1895, § 3816, providing that "every person may recover for torts committed to himself, or his wife, or his child, or his ward, or his servant," is merely declaratory of the common law. *Frazier v. Georgia Railroad Co.*, 101 Ga. 70, 28 S. E. 684. At common law the parent's right to recover for a tort to his minor child is, by legal fiction, predicated upon the relation of master and servant. *Frazier v. Georgia Railroad Co.*, 101 Ga. 70, 28 S. E. 684, and cases cited. In *Spear v. Cummings*, 23 Pick. (Mass.) 224, 34 Am. Dec. 53, it was held that "the teacher of a town school is not liable to any action by a parent, for refusing to instruct his children." This ruling was put upon the ground that there is no privity of contract between the parent and the teacher; the latter being responsible on his contract only to the town by which he is employed and paid. In *Sherman v. Charlestown*, 8 Cush. (Mass.) 161, Shaw, C. J., referring to the case just cited, in which he also delivered the opinion, said that the court were of opinion, among other reasons, that the action was misconceived, "because the father is not the person injured and entitled to recover damages in his own right." In *Stephenson v. Hall*, 14 Barb. (N. Y.) 222, it was held that an action will not lie in behalf of a parent, against the town superintendents of public schools, for expelling and excluding the plaintiff's minor child from the common schools, nor for damages sustained by the parent in bringing an appeal to the state superintendent of common schools, to get such child reinstated in the schools. * * * In *Donahoe v. Richards*, 38 Me. 376, 61 Am. Dec. 256, it was held that the parent of a child expelled from a public school by order of the superintending school committee can maintain no action against the members of the committee for such expulsion. In delivering the opinion, Appleton, J., said: "In this case, there is no act done by which the ability of the child to render service is diminished. The school is for her benefit and instruction. The education is given to her; and, if wrongfully deprived thereof, the loss of such deprivation falls on her. The wrong committed, the injury done, is done to her alone, and, if her rights have been violated, she alone

¹⁶ Part of the opinion is omitted and the statement of facts is abridged.

is entitled to compensation." So, in *Boyd v. Blaisdell*, 15 Ind. 73, where the plaintiff sued the school trustees of a township for refusing admission to his children into a district school in such township, it was held that the plaintiff could not maintain the action, as the parent can only sue for such injuries to his child as occasion loss of service. For all other injuries the child must sue.

All the cases cited, holding that a parent cannot recover for the expulsion of his child from a public school, were put upon the common-law doctrine (*Hall v. Hollander*, 4 Barn. & Cress. 660, 5 East, 45; *Flemington v. Smithers*, 2 Carr. & Payne, 292-578; *Frazier v. Georgia Railroad Co.*, 101 Ga. 70, 28 S. E. 684, and citations) that a parent cannot maintain an action for an injury to his child which does not result in loss of service, or cause expense to the parent. We have been able to find only one reported case out of harmony with this rule, viz., *Roe v. Deming*, 21 Ohio St. 666, where it was held: "The father of a child entitled to the benefits of the public school of the subdistrict of his residence may maintain an action against the teacher of the school and the local directors of the subdistrict for damages for wrongfully expelling the child from the school." There was no further opinion rendered, and no authority cited. We do not agree to the soundness of this dictum.

Counsel for plaintiff in error cites the case of *Board of Education of Cartersville v. Purse*, 101 Ga. 422, 28 S. E. 896, 41 L. R. A. 593, 65 Am. St. Rep. 312, admitting, however, that "the Purse Case did not decide the question involved here, but [contending] the analogous line of reasoning would establish the soundness of our contention." In that case it was held that a board of education having the charge and control of a system of free schools established by law and supported by taxation has the right to suspend from attendance upon school children whose parent, in undertaking to interfere with the discipline of a teacher over one of the children, enters the schoolroom of such teacher, during school hours, and, in the presence of the assembled pupils, is guilty of conduct toward such teacher which is subversive of the discipline of the school. The line of reasoning in the opinion in that case, delivered by Mr. Justice Cobb, led to the conclusion that "it would be contrary to the policy of our law, based as it is upon the common law, to bestow upon the child in the matter of its education any right independent of the parent." From this, counsel argues that it follows that, when a child is wrongfully expelled from a public school, the right of action for such expulsion is in the parent, and not in the child.

But the very opinion upon which counsel relies recognizes that there is a right of action in a child for his wanton and malicious expulsion or exclusion from a public school, in which he has been lawfully entered by his parent, and authorities to this effect are there cited. On page 444 of 101 Ga., page 904 of 28 S. E. (41 L. R.

A. 593, 65 Am. St. Rep. 312), the learned justice said: "While it is the act of the parent or guardian which places the child in the school and puts him in a position where he can obtain the benefits of the system, this does not prevent a duty from arising on the part of the school authorities towards the child to abstain from unlawful conduct which would deprive the child of the benefit which the act of the parent has secured to him. The moment the child is placed in school this duty arises. A breach of this duty will be a tort for which the child can recover in a proper action against the person wantonly and maliciously depriving him of the benefits which he would receive from the school. * * * Out of this breach of duty damage arises to the parent, as well as to the child. The parent therefore has the right to appeal to the courts to compel the child to be admitted or reinstated, as the case may be, and also to appeal to the courts by his action for damages for the amount which he would be required to expend in the education of his child. This child would also have a right against the individual thus wantonly and maliciously depriving him of the benefit which is secured to him by the law in the event the parent sees proper to enter him in the school." The same learned justice, in the opinion rendered in *Hurst v. Goodwin*, 114 Ga. 585, 40 S. E. 764, 88 Am. St. Rep. 43, said: "It does not, however, follow that the right of action for injuries of every character to a minor child is in the father alone. If the injury is one from which the father does not sustain any damage—that is, which does not destroy or impair the ability of the child to render services to the father—there is no right of action in the father for the wrong done the child."

In the case with which we are dealing, if, under the facts alleged, a right of action existed, it was in the children, not in the father, and it is their right, not his, which he is seeking to exercise in his own behalf. He makes no claim for money expended in the education of his children, in consequence of their expulsion from the public school. Indeed, his petition indicates that he spent no money for this purpose, as it shows that they were only out of the school about a month, during which time he was trying to get them reinstated therein. There is no allegation that he was put to any other expense by reason of their being expelled from the school.
* * * Judgment affirmed.

VI. Action by Parent for Seduction or Debauching of Daughter¹⁷

MIDDLETON v. NICHOLS.

(Supreme Court of New Jersey, 1899. 62 N. J. Law, 636, 43 Atl. 575.)

Action by William W. Middleton against George R. Nichols. Judgment for plaintiff. Application for rule to show cause why verdict should not be set aside.

LIPPINCOTT, J.¹⁸ * * * The action is one by the father to recover damages for the seduction of his daughter by the defendant, in behalf of whom this application for a rule to show cause why the verdict against him should not be set aside is made. The daughter became pregnant, and was delivered of a child, and died about three weeks after delivery. She was about 16 years of age at the time of her death.

Whether actual loss of service is necessary to maintain this action, it is not necessary to decide. I have always understood the principle to be that, if the relation of servant to the father be established, that is all that is necessary to sustain the action, and that the service may have been either actual or constructive, of which the father was deprived. "While the daughter is under age, and is maintained by the parent, he always has sufficient interest in her labor and services to afford a foundation for this action." Kensey, C. J., in *Van Horn v. Freeman*, 6 N. J. Law, 322. This was the doctrine approved by the text of the opinion in *Ogborn v. Francis*, 44 N. J. Law, 441, 43 Am. Rep. 394, and seems to be the rule in all the well-considered cases which have been brought to my attention. The right to control, with the actual control of, her services, if any were rendered or are to be rendered to him, seems to be the test or gravamen of the right of action. She may have been in the service of a third person at the time of the seduction, provided that the case be such that the father had the legal right to her services, and might have commanded them at pleasure. *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338.

It is only necessary to show that the parent has the legal right at the time to command the service of the child, and the English rule, so far as it requires actual service or actual residence with the father at the time, has been thus modified by American courts. *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100. In case of a minor, it is immaterial whether she lives with her father or not.

¹⁷ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 135-137.

¹⁸ Part of the opinion is omitted.

If she be at school abroad, she is his servant; that is, he has a right to her services, and can recall her when he pleases. Reeve, Dom. Rel. (4th Ed.) 363, 364. If any other rule prevailed, no action could be maintained for this injury in the higher ranks of life, where no actual services are usually performed or expected to be performed. Mauder v. Venn, Moody & M. 323. And in this latter case Littledale, J., said to the jury: "Proof of any acts of service was unnecessary. It was sufficient that she was living with her father, forming a part of his family, and liable to his control and command." "The law seems to be settled that when the daughter at the time of her seduction is under the age of twenty-one years, and the father was then entitled to her services and attentions, the law conclusively presumes that the relation of master and servant exists between them, although at the time of the seduction she may be in the actual service of another, under a contract made by herself for her own benefit." Hudkins v. Haskins, 22 W. Va. 645; 21 Am. & Eng. Enc. Law, 1016, and cases cited.

Cases are numerous where, when the father by his own act has emancipated his daughter from his control, or released his right to her services, or has abandoned her, the right of action has been denied. 21 Am. & Eng. Enc. Law, 1015-1020. But the loss of actual service in this case was amply established, and not disputed. All cases unite in declaring that the proof of the slightest service, of which the parent has been deprived, is all that is necessary. In this case it is conceded that the daughter was under age, and that the father was legally entitled to her services. The evidence is uncontradicted that the plaintiff, as her father, had the benefit of services rendered by her to him. She made her home in his household, and when at home she assisted her mother in performing household duties. This was a service to the father. He also received her wages that she obtained from her work in the factory in which she was employed at times, and the wages were expended by her father for her clothing, partly, and partly for other family needs. This was the situation at the time of the seduction. His right of action, therefore, was established beyond dispute. * * *

The only other objection to the verdict is that it was excessive. The verdict was for the sum of \$2,000. This contention of the defendant seems to be founded upon the idea that the plaintiff was entitled to recover only the financial value of the services of his daughter in his household or otherwise until she should arrive at the age of 21 years, or until she should be otherwise emancipated from such service, and the expenses of her confinement and sickness attendant thereon. But this view of the measure or elements of damage in this class of actions is at this day an entirely erroneous one. Whatever the anomaly may be between the basis of this action, and the measure or elements of damages recoverable on such basis, it is well established now that not only are the

value of the loss of service, and the expenses of pregnancy and sickness, recoverable, but compensation can be made to the parent for the humiliation and disgrace brought upon himself and his family, and for the mental anguish suffered, by reason of the ruin of his daughter and the dishonor of his household. The loss of service is not the rule of damage. It has been said that "it is scarcely an item in the account." The real ground of damage is the disgrace of the family. The loss of service in many—in most—instances could hardly be accounted anything, and yet often where the least service is or can be performed the highest damages can be given. The loss of service is but one step to that high plane of injury and wrong for which the parent is entitled to compensation. Damages are given to the plaintiff standing in the relation of parent. *Barbour v. Stephenson* (C. C.) 32 Fed. 66; *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; *Reeve, Dom. Rel.* (4th Ed.) 362; *Terry v. Hutchinson*, L. R. 3 Q. B. 602; *Coon v. Moffitt*, 3 N. J. Law, 583, 4 Am. Dec. 392; *Van Horn v. Freeman*, 6 N. J. Law, 322; *Ogborn v. Francis*, 44 N. J. Law, 441, 43 Am. Rep. 394; *Hudkins v. Haskins*, 22 W. Va. 645; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Hatch v. Fuller*, 131 Mass. 574; *Wilds v. Bogan*, 57 Ind. 453; *Bedford v. McKowl*, 3 Esp. 119; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Herring v. Jester*, 2 Houst. (Del.) 66.

The plaintiff was the head of a family consisting of himself, his wife, and other children; and the evidence shows that they were in all respects an estimable family, and in good repute in the community in which they resided. * * * The application for the rule is refused.

VII. Gifts, Conveyances, and Contracts Between Parent and Child¹⁹

EIGHMY v. BROCK.

(Supreme Court of Iowa, 1905. 126 Iowa, 535, 102 N. W. 444.)

WEAVER, J.²⁰ On March 2, 1890, one John Owens died intestate, seised of a farm of 160 acres in Taylor county, Iowa. His widow, Electa Owens, and two minor daughters, Ethel E. and Della T., the plaintiff herein, were the only heirs and beneficiaries of his estate, each becoming entitled to a one-third part. On August 8, 1895,

¹⁹ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 141.

²⁰ Part of the opinion is omitted.

the widow was married to L. W. Brock, the defendant. The plaintiff remained a member of the family until her marriage in January, 1903. At the date of the mother's marriage with Brock, plaintiff was about 12 years of age, and arrived at her majority October 22, 1901. Eight days later she united with her mother in conveying their respective interests in the land to the defendant. In consideration of the conveyance by plaintiff, defendant made to her his promissory note for \$1,000, due six years after date, without interest. On September 30, 1902, defendant discounted and took up his note; the total amount paid to the plaintiff in discharge of said obligation being \$694.53.

The plaintiff now alleges that the said conveyance was obtained by artifice, fraud, and undue influence; that defendant took advantage of her youth and inexperience, and of her dependent situation as a member of the family, and by such means, and by misrepresentations as to the value of her interest in the land, induced her to part with it for a grossly inadequate consideration. She tenders a return of the money received by her, and asks to have the conveyance canceled, and that she have an accounting for the rents and profits received by the defendant. The defendant denies all charges of fraud and wrong on his part, and alleges that plaintiff has ratified the conveyance, and cannot be heard to ask for its cancellation. The trial court found for the plaintiff upon the issues of fact. The decree entered permits the defendant to retain the title to the land, but requires him to account and pay therefor at its proved value. The value of the entire farm is placed at \$8,000, one-third of which would be \$2,666. But the court finds that the interest of the plaintiff, being undivided, is therefore worth something less than its full fractional part of the value of the land as a whole, and, for this reason, discounts or reduces the estimated value of the one-third to \$2,466. This sum, increased by plaintiff's share of the rents and profits, makes up an aggregate of \$3,426, for which the defendant was required to account. Against this sum the court allowed him credit for improvements made and incumbrances paid off, \$866, and the face of the note for \$1,000 which he had given to plaintiff, leaving a remainder of \$1,560, for which judgment was entered in plaintiff's favor, and made a charge upon the land.

From this decree the defendant first perfected an appeal. The plaintiff also appeals from so much of said decree as reduces or discounts the value of the undivided third of the land by the sum of \$200, and from the provision which charges her with the full face of defendant's note, instead of the sum actually paid by him in discharge of the debt.

It will be seen from this statement that the question presented is principally one of fact, and, without reviewing the testimony generally, we have to say we agree with the trial court in its conclusion that the conveyance in question was obtained in a manner and un-

der circumstances which clearly entitle plaintiff to equitable relief. The plaintiff was an inexperienced girl, and a member of the defendant's family. That the defendant had for some time harbored the purpose of obtaining the land is proven, and that immediately upon plaintiff's arrival at the age of 18 years, and while she was still an inmate of his household, he took the deed in controversy, is not denied. Conveyances made under such circumstances are viewed by the courts with distrust, and the parent or guardian who seeks to profit by such a transaction assumes the burden of negativing the inference of fraud and undue influence. Chidester v. Turnbull, 117 Iowa, 168, 90 N. W. 583; Mallow v. Walker, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; Harper v. Kissick, 52 Iowa, 733, 3 N. W. 449.

Under the record here presented, it cannot be doubted that defendant obtained the property at a grossly inadequate consideration—an inadequacy which was materially augmented by the act of defendant in obtaining the plaintiff's acceptance of a note payable six years in the future, without interest, and soon thereafter paying the same at a discount of more than \$300. Moreover, we think the record shows that defendant misrepresented to the plaintiff the value of her interest in the property, and that he was aided in the accomplishment of his purpose by advice of his wife given to her daughter to accept his offer, and thereby avoid domestic discord. The claim of the defendant that, by accepting the money on the note some months after the conveyance, plaintiff ratified the sale, cannot be sustained. She was then still a member of defendant's family, and was less than 19 years of age; and, while the feeling between her and defendant had been somewhat unpleasant, over matters having no connection with property rights and interests, there is nothing to show that she at this time knew or realized that she had been overreached in the deal with her stepfather. Ratification presupposes the withdrawal of the undue influence, and a free, intelligent assent to the contract by the person against whom it is asserted, after knowledge of the real nature of the transaction is or ought to be known to such person. 2 Pomeroy's Eq. Jur. § 964. We are therefore satisfied that the defendant's appeal cannot be sustained.

Upon the plaintiff's appeal, we are of the opinion that no good or equitable reason exists for permitting the defendant to have credit for a full \$1,000, when the full amount of his payment was but \$694.53. If, as the court below well found, the defendant was properly chargeable with fraud in obtaining this conveyance, no one circumstance connected with the deal affords more convincing support to that finding than is found in the fact that, after convincing plaintiff that \$1,000 was a fair compensation for her property, he procured her acceptance of promissory note having a present value of less than \$700. To permit him now to take credit for \$1,000 is

to permit him to profit by his own wrong, at the expense of the person whom we find entitled to relief against it. Neither do we coincide in the view that if the land was worth \$8,000—and this is certainly a low estimate, under the testimony of the witnesses—the value of the interest of the plaintiff's one-third should be estimated at anything less than one-third of that sum. While one witness, on being pressed by counsel, said that he thought the value of a fractional interest was less than a like fraction of the value of the whole, he offers no reason or explanation therefor; and, in our judgment, it does not afford sufficient ground on which to sustain the order of the court in this respect.

It follows that the decree of the district court must be affirmed on the defendant's appeal, and reversed on the appeal of the plaintiff. * * *

COOLEY P.& D.REL—14

PART III

GUARDIAN AND WARD

GUARDIANS—SELECTION AND APPOINTMENT

I. Selection and Appointment of Guardians by the Court¹

In re TULLY.

(Surrogate's Court, Kings County, New York, 1907. 54 Misc. Rep. 184, 105 N. Y. Supp. 858.)

CHURCH, S. This is an application by Alice Tully, an infant over 14 years of age, for the appointment of a guardian of her person and property, and also an application on behalf of her sisters, Angelina and Margaret Tully, infants under 14 years of age, for the appointment of guardians of their persons and property. The infant Alice, who is over 14 years of age, nominates as her guardian a maternal aunt; and it is suggested that the surrogate nominate the maternal uncle of the infants under 14 to act as guardian of their persons and the Hamilton Trust Company as guardian of their property. The mother of the infants is dead; but the father, who is living, opposes this application.

At the time of the hearing, I indicated it as my opinion that, in the case of the infant over 14, the function of the court was limited to the approval or disapproval of the choice of the infant, and that I had no power to make a nomination. Counsel for the father, however, has called my attention to the decision in *Ledwith v. Ledwith*, 1 Dem. Sur. 154, in which, in passing upon the sections of the Code relative to guardianship, the court holds that, where an infant has a parent living, it does not have arbitrary power to nominate a person other than its parent to act as guardian of its person, and, it is only where the parent is not a responsible person that the court will appoint some stranger who may be nominated by the infant. In this connection it may be said that, while the court has a liberal discretion in determining who should be appointed a guardian of

¹For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 156-158.

an infant, it should, nevertheless, respect the natural claim of a father to act as guardian of his own child, only refusing to recognize such right where the father is not a fit person and where the interests of the infant require the appointment of some one else.

In this case the most that is shown in opposition to the father's claim to appointment is that there were, on some occasions, quarrels between the parents of these infants; and it is also declared that he has been once or twice seen in an intoxicated condition. It appears that the father lived but a short distance from the maternal grandparents of these infants, and that the grandparents were very fond of the children and contributed largely to their support. It is not shown, however, that the father neglected to support them. On the contrary, the testimony of the infant Alice shows that, whenever it was apparent that the children needed anything, he saw that they received it. He gave them spending money, placed the oldest child in a private school, and paid for her tuition for a considerable period in advance. On the other hand, it appears that for a number of years the father has been in the employ of the city, and has done steady and consistent work, which has, apparently, met with the full approval of his superiors. While the income derived from his labor is not so great as that of the grandparents of these infants, yet this cannot be said to be a reason for depriving him of his children. They are his children, and he is entitled to bring them up according to his means and his ability to do so, and he is not to be deprived of this privilege unless he is shown to be an unstable person and unmindful of his parental duty; but in none of the authorities or text-books that I have read has the fact that his financial ability was not so great as that of some other persons who would be willing to take the infants been regarded as a sufficient ground to compel him to part with his children.

The same reasons which induce me to nominate the father to act as the guardian of the person of the child over 14 are sufficient to warrant me in nominating him as guardian of the children under 14. As to the guardian of the property of the infants, I think the suggestion that the Hamilton Trust Company be appointed a wise one. Let decree be entered accordingly.

Decreed accordingly.

II. Jurisdiction to Appoint Guardian²

In re BRADY.

(Supreme Court of Idaho, 1904. 10 Idaho, 366, 79 Pac. 75.)

AILSHIE, J.³ This case arose out of the facts and transactions disclosed in the case of Pine v. Callahan, 8 Idaho, 684, 71 Pac. 473. The appellant, Thomas J. Purcell, having been named by the purported will of John C. Brady, deceased, as the testamentary guardian of the minors, Arva and Elmer Brady, applied to the probate court of Kootenai county, and was on the 20th day of July, 1901, appointed as general guardian of the persons and estates of the said minors. At the time of the death of John C. Brady, these two minor children were living and residing with their father in Kootenai county. Their mother had died some two years previous. The domicile of the minors was not changed after the death of their father, and still continued to be in Kootenai county at the time of the appointment of the appellant as general guardian.

On the 29th day of July, 1901, it seems that Frank Pine, a resident of the state of Iowa, who is named in this proceeding as the guardian of the minors, was appointed by the district court of Keokuk county, Iowa, as guardian of the persons and property of the minors, Arva and Elmer Brady. It appears that some time between the 20th and 29th days of July, 1901, the Iowa guardian, Frank Pine, who is a maternal uncle of the minors, in some surreptitious way, or at least not by an order of any Idaho court, removed the children from this state and took them to the state of Iowa. It is clear that Pine was neither the natural nor testamentary guardian of these minors, and it is doubtful if, under the facts in this case, he had any power or authority to change their domicile, although he removed them physically from the jurisdiction of the domicile. Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 758. It is shown by the record that the maternal and paternal grandparents of these minors were all living at the time of these transactions, but it nowhere appears that any of the grandparents ever changed the domicile of the minors or participated therein.

Soon after the death of Brady, John C. Callahan, who was named as executor in the purported will, filed the document in the probate court of Kootenai county, and asked to have the same admitted to probate as the last will and testament of John C. Brady, de-

²For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 159.

³Part of the opinion is omitted.

ceased. About the same time the respondent, Pine, filed a petition asking that he be appointed guardian ad litem for the purpose of contesting the validity of the document purporting to be a last will and testament. This petition was granted, and Pine was appointed as guardian ad litem, and thereafter successfully prosecuted the contest of the will to a final judgment in this court, as announced in Pine v. Callahan, *supra*.

After the conclusion of the litigation over the probate of the will, the general guardian, Thomas J. Purcell, who had been appointed by the Idaho court, filed his petition in the probate court of Kootenai county, accompanied by an itemized statement of his expenses and disbursements incurred in carrying on the litigation, and prayed for a settlement and allowance of the same. To this petition Pine filed a demurrer, and at the same time an answer. The respondent interposed two grounds of demurrer: "(1) That this court has no jurisdiction of the subject of the said petition. (2) That the petition does not state facts sufficient to constitute a cause of action, and to entitle the said petitioner to the relief prayed for therein."

This demurrer was sustained by the probate court, and judgment was thereupon entered dismissing the petition. From the judgment and order so entered the petitioner appealed to the district court, where the matter was again heard upon the demurrer, whereupon the judgment and order of the probate court was affirmed. From the judgment and order of the district court the petitioner, Thomas J. Purcell, appealed to this court.

The substance of the first contention made by the respondent in this case is that, since the minors are beyond the jurisdiction of the courts of Idaho, and are under the care and protection of a guardian appointed by the court of another state, this court has lost jurisdiction of the subject-matter. It should be here observed that the general guardian appointed in this state never came into possession of any property belonging to his wards, except three insurance certificates on the life of the deceased father and in favor of the minors. These insurance policies have been in the possession of the guardian and the probate court of Kootenai county ever since the appointment of appellant as general guardian.

We do not understand how the unauthorized removal of the wards from the jurisdiction of the domicile to another state, or the appointment of a guardian by a court of a foreign jurisdiction, can oust the courts of this state of the jurisdiction which they had once acquired. There is no doubt but that when the wards were domiciled within this state, and their only property, these insurance policies, were within the state, the probate court had jurisdiction to appoint a general guardian, and to direct and control his conduct as such guardian. After having made such appointment, the court retained jurisdiction for all purposes in connection therewith until his accounts are rendered and he is legally discharged.

If the domicile of the wards should be legally transferred to another state, and the wards retained no property in this state requiring the care and attention of the guardian, such facts might, and perhaps would, be cause for settlement of the account of the guardian in this state and his discharge. But that question does not arise in this case.

It is argued, however, that the general guardian appointed by the probate court of this state, who was also named as testamentary guardian in the purported will, was without authority to conduct the litigation over the probate of the will, and to incur expenses in connection therewith. We are not in accord with this view of the case. It would seem to us that where the will appeared to be legal and fair upon its face, as it did in this case, and by the terms of such will the testator had named a guardian for his minor children, it was within the scope of the guardian's power and authority to pursue reasonable methods for the proof and probate of that instrument. Sections 5669 and 5673, Rev. St. 1887, indicate a legislative intent to cover such cases as this. He was recognized and treated as general guardian by all the courts of this state throughout the entire litigation over the probate of the will. See Pine v. Callahan, supra.

The second point argued by respondent is that the petition does not allege that notice was given of the application for appointment of a guardian, as required by section 5770, Rev. St. 1887, and that it does not show that all the steps were taken, as required by statute, in securing the appointment of appellant. The argument under this point proceeds upon the theory that the probate courts of this state are courts of inferior and limited jurisdiction. That point has been decided by this court adversely to the contention of respondent in Clark v. Rossier, 10 Idaho, 348, 78 Pac. 358. In that case it was said: "A court of general jurisdiction is one whose judgment is conclusive until modified or reversed on direct attack, and which court is competent to decide on its own jurisdiction, and exercise it to a final judgment, without setting forth the evidence. The record of such court is absolute verity. The probate court of this state, as far as its jurisdiction in regard to probate and guardian matters is concerned, is such a court." * * * Judgment reversed.

RIGHTS, DUTIES, AND LIABILITIES OF GUARDIANS

I. Maintenance of Ward—Use of Principal of Estate¹

DUFFY v. WILLIAMS.

(Supreme Court of North Carolina, 1903. 133 N. C. 195, 45 S. E. 548.)

Proceedings by the state, on relation of Rodolph Duffy, solicitor, against W. H. Williams, guardian. From a judgment for defendant, plaintiff appeals.

MONTGOMERY, J.² The referee found as a fact that the guardian, for the maintenance of his wards, had expended, without an order of court, a greater amount than the income of their estate, but that the expenditures were reasonable and necessary, and that, as a matter of law, he should be allowed in his settlement with the wards such amount as he had paid out of the capital of the estate. The affirming of these findings by his honor, and the defendant's exception thereto, constitute the most serious question raised by the appeal.

The defendant, W. H. Williams, Jr., in 1888, was appointed and qualified as guardian of James M., Florence H., Annie R., John E., and Stella Williams, infant children of J. M. Williams, his deceased brother. The evidence tends to show that the real estate of the wards was worth about \$14,000, and that the guardian received about \$5,000 in money belonging to the estate; that the Williams family was a most respectable one, was possessed of considerable property, and of good social position; that the oldest child at the time of the appointment of the guardian was about 12 years of age, and the youngest between 3 and 4; that through about 10 years of the guardianship the wards were kept in the home of their uncle, the guardian, and received his care and attention, as well as that of his wife, and were at the close of his guardianship well reared, of good manners, and fair educational advantages. That part of the corpus of the estate which consisted of money—\$5,000—had been used by the guardian in those expenditures.

We have numerous decisions of our court, from that of *Long v. Norcom*, 37 N. C. 354, down to and including that of *Tharington v. Tharington*, 99 N. C. 118, 5 S. E. 414, in which it is laid down

¹ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 162-166.

² Part of the opinion is omitted.

as a general rule that expenditures by a guardian of a larger amount of the ward's estate than the income arising therefrom for the maintenance and education of the wards will not be allowed by the courts, and that the courts will show less favor to the guardian who has already made such expenditures of his own head before he has asked the authority of the court to do so. But it has never been held that these rules are so hard and fast as to admit of no exceptions. Acts 1762, c. 62, on the subject of guardian and ward, in its twenty-fifth section contains a reservation in the court of equity of their former jurisdiction in matters and things relating to orphans and their estates; and in *Long v. Norcom*, *supra*, it is said: "The county court may not be authorized under the act of 1762 to do more than apply the profits of one year to the deficit of a preceding year; but the court of equity has power—though it may be seldom willing to exercise it—to take the capital itself, and apply it for maintenance, either future or past." The powers which the court of equity then had and exercised are now conferred upon the clerk of the superior court in Code, §§ 1566–1568. If the guardian, then, in the present case, had received from the clerk of the superior court an order authorizing and directing him to use a part of the capital of his ward's estate, the expenditure would have been legal and proper.

The question, then, is, as it was in *Long v. Norcom*, *supra*, whether the guardian shall be allowed such disbursements as were deemed to be proper, or whether they shall be disallowed upon the single ground that the guardian did not obtain the authority of the court before he made the expenditures. We are of the opinion that, if the court had the power to authorize these expenditures to be made—and we have seen that the court of equity formerly had such power, and that the clerk of the superior court now is possessed of that power—the court could allow the guardian the amount of such past expenditures. The referee in this case has found from the evidence that the amount expended by the guardian was necessary to maintain the wards, and to give them that degree of education necessary to their station in life. The wards could not be sent to the charitable institutions of the county for support, because the wards owned a large amount of property; and under such circumstances as appear in the case, if it has ever been held by the courts of this state that a ward should be put out as an apprentice, then we think the rule should be modified and altered. If the wards then should not have been put out as apprentices, and could and would not have been received for support by the county as paupers, then, the income of the estate not being sufficient to furnish maintenance for the wards, the guardian had no choice but to use a reasonable amount of the capital for such support and maintenance; and the report of the referee allowing the same as

reasonable and necessary was proper, and there is no error in that part of the judgment of the court below in affirming that finding of the referee. * * * Modified and affirmed.³

II. Change of Ward's Domicile by Guardian⁴

LAMAR v. MICOU.

(Supreme Court of United States, 1884. 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751.)

See post, p. 230, for a report of the case.

III. Management of Estate—Guardianship as a Trust⁵

BOOTH v. WILKINSON.

(Supreme Court of Wisconsin, 1891. 78 Wis. 652, 47 N. W. 1128, 23 Am. St. Rep. 443.)

ORTON, J. The appellants are the heirs at law of William Booth, deceased. Two of them are of age, and one still a minor, who appears by guardian ad litem. The respondent was their general guardian. Their mother, Mrs. Booth, had removed to Nebraska with her children, and had there been appointed guardian of the one infant heir, and the moneys belonging to the heirs had been sent to her there, by the respondent, when received by him. The respondent had sold a farm belonging to their estate, as guardian, to one Hitton, for about \$11,000, on notes secured by mortgage, all of which, and interest thereon, had been paid to the respondent, except the last two, amounting to \$2,000, and the money had been sent to Mrs. Booth, in Nebraska. The respondent had been notified by the county judge to make final settlement of his guardianship on the 12th day of February, 1884, and he therefore called

³ See, also, Abrams v. United States Fidelity & Guaranty Co., post, p. 222, and Mauldin v. Southern Shorthand & Business University, post, p. 259. And see Pinnell v. Hinkle, 54 W. Va. 119, 46 S. E. 171 (1903).

⁴ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) § 167.

⁵ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 168, 169.

on Mr. Hitton to pay the last two notes, and Hitton looked around to borrow the money, and said that he could get it of one Mr. Harmes. Harmes called on the respondent on the 20th or 22d of January, to see in what shape he wanted the money. Harmes said it was in the Platteville Bank, and the respondent said: "If it is in the bank, it would be best to leave it there;" and that he would not want it until February 12th, the time of such settlement, and that he would then have to get a draft to send to Mrs. Booth, and it would be right there. Harmes then got a certificate of deposit, and turned it over to Hitton, and Hitton delivered it to the respondent on the 28th day of January, 1884. The following is a copy of the certificate: "Platteville, Wis. January 24, 1884. John Harmes has deposited in this bank two thousand dollars, payable to the order of David Wilkinson in current funds, on the return of this certificate properly indorsed. [Signed] O. F. Griswold, Cas." The respondent held the certificate for the purpose of having it present on the 12th or 13th day of February, the day of final settlement. On the 8th day of February the bank broke, and the money was lost. On said settlement the respondent was credited and allowed by the county court this \$2,000. On appeal to the circuit court said judgment was approved by proper findings of fact and conclusions of law, and from that judgment this appeal is taken.

I have stated the facts about the delivery of the certificate according to the testimony of the respondent. This statement of the facts relates only to this certificate of deposit, as this is the only subject of contention on this appeal. I have stripped the case of everything not material to the only question on this appeal. Nothing omitted would affect the question. It does not appear that the respondent directed how the certificate of deposit should be drawn, but he knew when he received it how it was drawn, and accepted it in its present form. He knew that the deposit stood on the books of the bank to his own personal credit. It could not be known by the books of the bank that this was trust money, and not his own. The rule may be technical and arbitrary to some extent, but it is based upon the soundest principles of business economy and integrity, and approved by the highest courts of this country and of England with such a unanimity of judgment as to make it an established principle of law, that, if a guardian deposits the money in his hands belonging to the heirs in a bank in his own name, and to his own credit, without any ear-marks or indicia to distinguish it as the money of the heirs, or of the estate or trust funds, and the bank fails, it will be held to be his own personal loss, and not that of the heirs. No circumstances will justify it if such is the character of the deposit. It is not a question of good faith or of integrity—it is a question of naked fact—which determines its legal character.

The reason of the rule is obvious. The following extract from the opinion of Judge Porter in *McAllister v. Com.*, 30 Pa. 536, expresses, once for all, the rule, and some of the reasons of it: "If he [the trustee] undertakes to make a deposit in a banking institution, the entry must go down on the books of the institution, in such terms as not to be misunderstood, that they are the funds of the specific trust to which they belong. He cannot so enter them as to call them his own to-day, if they are good, and to-morrow, if bad, ascribe them to the estate, or shift them in an emergency from one estate to another, or by the deposit secure the discount of his own note, and have the deposit snatched at by the bank, if the note be not paid, or attached by a creditor as the depositor's individual property. * * * No matter what he intends to do, or what the cashier or clerk may think he is doing, the deposit must wear the impress of the trust, or he cannot, when brought to account, call it trust property." This was the exact condition of this fund, and all the reasons of the rule are applicable to it as the personal and individual deposit of the respondent. The rule is inflexible, and there is not in this case a single circumstance which makes the rule inapplicable to it.

This is all that need be said in this case, for this court has sanctioned the rule in a recent case, where the depositor informed the teller of the bank, who gave the certificate of deposit, that they were trust funds, and did not belong to him. In *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708, Mr. Justice Cassoday marshaled and passed in review the leading authorities of this country and of England, and sanctioned the rule in a case that rules this in all essential particulars. The loss in this case was that of the respondent, and not that of the heirs, or their guardian in Nebraska; and therefore the respondent should be charged with this \$2,000 in the settlement of his guardianship.

The judgment of the circuit court is reversed, and the cause remanded, with direction for further proceedings in accordance with this opinion.

In re TANNER'S ESTATE.

(Supreme Court of Pennsylvania, 1907. 218 Pa. 67 Atl. 646.)

In the matter of the estate of Stella A. Curtis Tanner, minor. From a decree of the orphans' court, setting aside guardian's sale, Bryant E. Sherman and others appeal.

Bouton, P. J., filed the following opinion in the court below:

"From the record it appears that Wallace E. Curtis died at Bradford, in this county, on August 22, 1888, intestate, leaving a widow, Dillie Curtis, since intermarried with Jacob Dollmetsch, and a daughter, Stella A. Curtis, all of whom reside in this county; that

on or about August 27, 1888, letters of administration were issued to the said Dillie Curtis, and that on November 9, 1903, Bryant E. Sherman was appointed guardian of said minor daughter, Stella A. Curtis; that the said Wallace E. Curtis was, prior to his decease, seised and possessed of a certain tract of land situated in this county, known as the 'Mantz farm,' containing 130 acres and 93 perches; that the right to take the petroleum, rock oil, and gas in, underlying, or appurtenant to the said land was reserved by the grantors of the said Wallace E. Curtis for the term of 20 years from August 26, 1885, there being at that time upon the said land 19 wells producing oil. It further appears that by sundry conveyances the said Bryant E. Sherman, Charles F. Schwab, and D. E. Haffey became the owners of the said wells and oil rights so reserved, and were in possession and operating the same at the time the petition for sale was presented in this case. It further appears from the petition that the said minor, Stella A. Curtis, would become the owner of the said oil right so reserved by the grantor of Wallace E. Curtis on August 26, 1905, subject to the dower right of her mother.

"On December 14, 1903, the said Bryant E. Sherman, guardian, presented his petition to this court praying for an order authorizing private sale to Charles F. Schwab of the interest of his said ward, Stella A. Curtis, in and to the petroleum or rock oil and gas in the said tract of land for the sum of \$1,666.67; and on the same day the court authorized said private sale, the purchase price to be paid in cash. Following this order deed was made and executed by the guardian to the said Charles F. Schwab, purchaser, which deed was duly acknowledged and delivered to the said Charles F. Schwab. On September 14, 1904, the said Stella A. Curtis, then intermarried with Edward Tanner, by her next friend, the said Edward Tanner, presented her petition to this court, praying that the sale to Charles F. Schwab be set aside and the decree of confirmation be revoked, and for a decree directing a reconveyance of the said oil right and restitution of the purchase money. Upon this petition rule to show cause was granted, to which rule the said Bryant E. Sherman, Charles F. Schwab, and D. E. Haffey each filed separate answers.

"The petition avers that the sale was made and consummated under an arrangement between the said D. E. Haffey, Charles F. Schwab, and Bryant E. Sherman, in which it was agreed that a sale thereof should be made for the sole purpose of obtaining a title to said oil right in the said Charles F. Schwab, and that he should thereafter make a transfer of the portion of the same to the said D. E. Haffey and Bryant E. Sherman according to the respective interests in said land, and that said agreement had been consummated and carried out, and said parties are now the owners thereof and in possession of the same. These allegations are not denied by

the respondents, Bryant E. Sherman, Charles F. Schwab, and D. E. Haffey, or either of them. From the evidence it appears that the said Stella A. Curtis was 19 years of age on the 19th day of March, 1906, that the rights to the oil and gas which were owned by Sherman, Schwab, and Haffey were about to expire, and they, being desirous of continuing the operations for oil and gas and of becoming the owners thereof, talked the matter over with the widow in the office of Attorney Burdick, and it was there understood and arranged that Bryant E. Sherman was to be appointed guardian, was to make the application to the court to sell the interest of his ward to Charles F. Schwab, and that Schwab was to become the purchaser, not for himself alone, but for the joint interest of himself, Bryant E. Sherman, and D. E. Haffey, and was to convey to Sherman and Haffey an interest in the same corresponding in quantity to the interest which they held prior to the sale. * * *

"The petition for the sale of the land is entirely silent as to the purpose of the purchaser to convey an interest to the guardian and to D. E. Haffey under a previous arrangement so to do, and no information of this intent was given to the court. True it is that the answers of the respondents deny any fraud in the transaction or any inadequacy of price, and it may be that the price paid was all the interest of the minor was reasonably worth. Be that as it may the fact that the guardian without leave of court made the sale with the understanding that he was to have an interest in the property reconveyed to him puts him in the same position as a guardian purchasing at his own sale, and amounts to a fraud in law, and gives the ward the right to avoid the sale at her election. As we understand the law, where a trustee purchases at his own sale the interest of his *cestui que* trust, the sale is avoidable at the election of the *cestui que* trust without proof of actual fraud. The rule that a party will not be elected to purchase and hold property for his own use and benefit to which he stands in a fiduciary relation, if contested by the *cestui que* trust, is inflexible, and without regard to the consideration paid or the honesty of the intent. Chorpenning's Appeal, 32 Pa. 315, 72 Am. Dec. 789; Beeson v. Beeson, 9 Pa. 279. No person acting in a fiduciary character can purchase at his own sale, directly or indirectly, or acquire by purchase, any interest in the trust estate, without the consent of the beneficiary or others interested therein, or of the court having jurisdiction of the trust. Brittain's Estate, 28 Pa. Super. Ct. 144. See, also, Shuman's Appeal, 27 Pa. 64; Hannum's Appeal, 2 Penny. 103. Or unless, if selling under a power, he is by its terms permitted to purchase. Brittain's Estate, *supra*. Under the facts in this case the sale must be set aside."*

* The statement of facts is abridged.

PER CURIAM. The fact, alleged in the petition and not denied in the answer, that the sale of the minor's interest in land was made by her guardian for the purpose of securing for himself and others the title thereto, was sufficient ground for setting aside the sale without proof of actual fraud or inadequacy of price. That the intent was honest and a full consideration was paid does not prevent the application of the rule that a person assuming a fiduciary relation towards another in regard to property is disabled from using his power for his private benefit and that he cannot directly or indirectly become a purchaser at his own sale. It is a rule founded on public policy, to prevent a conflict between interest and duty. It is said in the notes to *Fox v. Mackreath*, 1 Lead. Cases in Equity, 239: "It matters not that there was no fraud contemplated and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it. It is one of those processes, derived from the system of trusts, by which a court of chancery turns parties away from wrong, and from the power of doing wrong, by making their act instantly inure in equity to the rightful purpose. The cases are uniform in declaring that it matters not how innocent and bona fide, and free from the suggestion of fault, the transaction may be."

The judgment is affirmed, at the cost of the appellants.

IV. Same—Collection and Protection of Property⁷

ABRAMS v. UNITED STATES FIDELITY & GUAR- ANTY CO.

(Supreme Court of Wisconsin, 1906. 127 Wis. 579, 106 N. W. 1091, 5 L. R. A. [N. S.] 575, 115 Am. St. Rep. 1055.)

Action by Robert Abrams as guardian of Bessie Avery and others against the United States Fidelity & Guaranty Company. From a judgment in favor of plaintiff, defendant appeals. This is a proceeding to settle the final account of Sarah Perry as the guardian of the estate of certain minors. The appellant was a surety upon the guardian's bond, and was made a party to the proceedings in the county court, and appealed from the order of that court settling the guardian's account to the circuit court, where the matter was again tried and the account settled, and from that judgment the surety appeals to this court.

It appeared that Herbert D. Avery, and his wife, Ida, resided

⁷ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 172.

in Colorado, where Ida died December 4, 1899, leaving four small children, Bessie, Perry, Alois, and Marie, the minors in question, and about December 20, 1899, Sarah Perry, a sister of the deceased, went to Colorado and brought the children to her home in Winnebago county, in this state, to live with her, under an arrangement with the father that the father was to pay what he could for their keeping; that the father was killed in a railroad accident on the Colorado & Southern Railway, October 18, 1900, leaving the four children as his only heirs at law; that Sarah Perry was appointed guardian of the persons and estate of the minors by the county court of Winnebago county December 4, 1900, and gave a guardian's bond in the sum of \$8,000, with the appellant as surety; that the guardian at once employed one Herbert L. Sweet, then an attorney of good standing in Oshkosh, as her attorney; that at the time of Avery's death he had two policies of life insurance, one in the Independent Order of Foresters, of \$3,000, and one in the Ancient Order of United Workmen, of \$2,000, both being in favor of his heirs; that he also left some property in Colorado, which was afterwards administered upon, the net amount realized being \$482.98; that there was also an unsettled claim against the railroad company for the death of said Herbert; that the mother, Ida, left 40 acres of land in Winnebago county, title to which passed to the minors; that Miss Perry, as guardian, put the various claims into Sweet's hands for collection, and that under authority from the county court of Winnebago county a settlement was arranged by Sweet with the railroad company of the death claim on the basis of the payment of \$1,250. Miss Perry, as guardian, signed a receipt and release for this claim, and Sweet sent the same to the railroad company, and a check for \$1,250 was returned to Sweet.

There was no direct evidence as to whether this check was payable to the guardian or to Sweet. The court found, however, that it was payable to Miss Perry and was indorsed by her and turned over to Sweet. The claim against the Independent Order of Foresters was also collected by Sweet, the draft being sent to him, payable to the order of Miss Perry, who indorsed the draft and signed the receipt and returned both draft and receipt to Sweet. The guardian testified, and the court found, that she left these drafts in the hands of Mr. Sweet for investment, and that the same course was pursued with the sum of \$482.98 collected from the administration of Avery's estate in Colorado. It appeared without dispute that Sweet immediately deposited the drafts in each case to his own credit in the bank. The sum of \$2,000 from the Ancient Order of United Workmen was paid to Miss Perry in cash, and she kept \$1,000 thereof, and took the other \$1,000 to Sweet and left it with him to invest. Sweet returned to Miss Perry \$200 out of the \$1,250 received from the railroad company, but did not return

any other sums. He claimed that he had invested the money in real estate mortgages, and to deceive Miss Perry made some payments to her of sums which he claimed to have received as interest on the investment, but he never turned over to her any securities, and, in fact, used the moneys himself as soon as he received them, and left the city in the spring or summer of 1902, leaving many thousand dollars of liabilities, including his liability to the guardian. Miss Perry made no effort at any time by suit to obtain the moneys or the securities from Sweet. She made no charge at any time against the infants for care, lodging, or food, but kept accurate account of the moneys expended for clothing, schoolbooks, and other incidentals. She testified that she never intended to charge them for care or lodging, and the court found that she stood in the relation of parent to them.

In the account, as settled by the circuit court, the guardian was charged with the sums received from the insurance companies, the railroad company, and from the estate in Colorado, with interest on such sums at 6 per cent. * * * She was credited with the sums which she paid for taxes and repairs upon the real estate, also with the sums paid for clothing and incidentals paid for the minors, and with the premium paid for her bond. She was also allowed \$50 as a reasonable amount for legal services, and \$1,450 for food furnished to the minors from December 20, 1899, to February 20, 1904, less \$330 received from the father. She resigned as guardian of the estate of the minors February 20, 1904, and the respondent Abrams was appointed to that trust, and this accounting was thereafter had.

WINSLOW, J.⁸ The guardian was a trustee of the funds of her wards. It was her duty, on receiving such funds, to keep them for her wards, and to invest so much of them as was not required for immediate and necessary use, as soon as she could do so with reasonable diligence. She could employ an attorney to collect them, and, if she exercised reasonable care and prudence in the choice of an attorney, doubtless she would be protected from losses occurring by the fraud or negligence of the attorney in the course of his duty as collecting agent, but when she had received the funds by draft or in cash the functions of the attorney for collection ended, and if she then placed the fund in his hands to invest he became simply an agent to whom she had attempted to delegate her duties as trustee. Mr. Lewin, in his work on *Trusts* (volume 1, p. 252), says: "Trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons; and, if they do so, they remain subject to the responsibility towards their cestuis que trustent for whom they have undertaken the duty. If a trustee, therefore, con-

⁸ Part of the opinion is omitted and the statement of facts is rewritten.

fide the application of the trust fund to the care of another, whether a stranger, or his own attorney or solicitor, or even co-trustee or co-executor, he will be held personally responsible for any loss that may result."

This principle is firmly established. It does not mean that a trustee may not employ a broker or attorney to do those things which in the ordinary course of business such agents would be employed to do, but simply that he cannot delegate to others the doing of those things which he is in duty bound to do himself. The collection of claims against others involving actions at law or negotiations for settlement may well be intrusted to an attorney. The guardian has not undertaken to act as an attorney, but the care and investment of the funds which reach his hands is one of the very things which the guardian has agreed to attend to, and if he delegates this duty to another, whether he be an attorney or a layman, he makes such other his personal agent and is responsible for his acts. A guardian's duty, by the terms of his appointment, is "to dispose of and manage" his ward's estate according to law, and such is the tenor of his bond. He may employ attorneys or agents according to the usual course of business to reduce the estate to possession and to protect it, but when once in his hands his personal duty to dispose of and manage it begins, and this duty is not to be delegated.

These considerations really dispose of the most serious question raised by the appellant in this case, namely, the question whether the guardian should be charged with the sums received from the railroad company, the Order of Foresters, and the administrator of Avery's estate in Colorado. The claim is that these sums never, in fact, came to the hands of the guardian, but were squandered by the attorney in the process of collection. The court found, upon sufficient evidence, that these amounts were represented by bank drafts or checks payable to the order of the guardian, which came to the guardian through the attorney, and that the guardian indorsed them and handed them back to the attorney, to be invested by him for her as guardian. It must be held that, when the draft came to her hands, she came into possession of so much of her ward's estate. Her personal duty to manage that estate then began. * * *

It is contended that the court should have allowed the guardian a reasonable sum for lodging of the children and for her personal services in their care. The fact was that she voluntarily stood in loco parentis to these children, and never intended to charge them anything for lodging or services. Under these circumstances neither the guardian nor the surety has any right to such credit. *Hutson v. Jenson*, 110 Wis. 26, 85 N. W. 689. * * * Judgment affirmed.

ROUSH v. GRIFFITH.

(Supreme Court of Appeals of West Virginia, 1909. 65 W. Va. 752, 65 S. E. 168.)

Suit by Margaret V. Roush and others against D. S. Griffith and E. B. Faulkner, as administrators of the estate of Moses S. Grantham, deceased. There was a decree in favor of plaintiff, charging the estate with \$3,070, and the defendants appeal.

POFFENBARGER, J.⁹ * * * The decree charges the estate, on account of Grantham's guardianship for the plaintiff, commencing on the 16th day of June, 1854. Mrs. Roush was then a little child, less than two years old, the daughter of William T. Seibert, who died some time prior to the date aforesaid. Grantham qualified as her guardian, and gave bond as such in the penalty of \$3,200, with M. K. Seibert and B. Cushwa as sureties. The only evidence tending to show the amount of money that went into his hands as guardian is the settlement made by Barnett Cushwa, administrator of William T. Seibert, before Seaman Gerard, commissioner of the county court of Berkeley county, on the 12th day of August, 1854, showing that he had received on account of said estate \$4,333.10, and, after having made certain disbursements on account of indebtedness, had paid to the widow \$700 and to Grantham, as guardian, on the 12th day of July, 1854, \$500, and on August 9, 1854, \$900, and then had in his hands a balance of \$290.12 due the estate. The court in its decree aforesaid charged the estate of Grantham with the \$500 and \$900 items and two-thirds of the \$290.12 item. There is no evidence of Grantham's ever having paid anything to his ward, but in her bill she admitted payments of \$600 at one time, \$100 at another, and \$50 at another. The administrator and heirs in their answers say they are unable to find among the papers of Grantham any books or memoranda of any kind showing either receipts or disbursements on account of said estate. After attaining her majority, Margaret V. Seibert, only heir at law of William T. Seibert, and ward of Moses S. Grantham, intermarried with Charles Roush, and in October, 1886, she and her husband brought this suit. * * *

Insufficiency of the report of the settlement made by Cushwa, administrator, to prove payment to the guardian by the entries or statements therein to the effect that he had made certain payments to him, is relied upon as conclusively overthrowing the decree; but this contention ignores liability on the part of the guardian for money or property which he might have reduced into his possession, by action or otherwise, even though the nature of the claim was such as to require the action to be brought in the name of the ward by his next friend, in addition to money or property

⁹ Part of the opinion is omitted.

actually received by him, subject to his right to show that money or estate not received was lost otherwise than by his negligence or lack of prudent and diligent effort to obtain and preserve the same. A guardian is liable, not only for what has actually come into his hands, but also for what, by the exercise of reasonable diligence and prudent action, he might have obtained, but which he suffered to be lost by his negligence. The statute (section 7, c. 82, Code 1899 [Code 1906, § 3220]) requires him, on the expiration of his trust, to "deliver and pay all the estate and money in his hands, or with which he is chargeable, to those entitled thereto." In the opinion of Prof. Minor this statute imposes upon the guardian the duty to collect, or cause to be collected, all solvent debts due the ward, as appears from the following statement in 1 Min. Ins. 476, made after quoting the statute: "He must, therefore, account for all of the ward's estate, including all evidence of claims that did come, or, with due diligence, might have come, into his possession."

The statute is no doubt merely declaratory of law well established otherwise than by statute; for, in *Brown v. Brown's Adm'x*, 2 Wash. (Va.) 151, the court said: "Hence it appears that this money either was received by Thomas Brown, the guardian, or he was guilty of gross neglect of duty, either of which would be a proper ground for charging him therewith." *Lincoln's Adm'r v. Stern*, 23 Grat. 816, impliedly asserts liability of the guardian for negligent loss of the ward's estate, never reduced to his possession, but recoverable in the name of the ward. A decree, based on this principle, was reversed, merely because there had been no inquiry into the condition of the claims, or as to whether they had been collected, were collectible, or lost, if at all, "through the default or neglect of the guardian." This basis of liability on the part of a guardian seems to be generally recognized by the courts. "Any funds which by the exercise of due diligence he (the guardian) would have received, as, for instance, sums due to the ward which he negligently failed to collect, or income which was lost by his failure properly to invest the funds or rent the real estate, will also be charged to him." 15 Am. & Eng. Ency. Law, 92. This text is well sustained by numerous decisions cited in support thereof. A guardian must collect from his predecessor, an executor or an administrator from whom an estate is due to his ward. *Burke v. Turner*, 85 N. C. 500; *Bescher v. State*, 63 Ind. 302; *State v. Greensdale*, 106 Ind. 364, 6 N. E. 926, 55 Am. Rep. 753; *Keenan's Estate*, 6 Kulp (Pa.) 67; *Horton v. Horton*, 39 N. C. 54.

It appears here beyond successful contradiction that there was due from the administrator of the estate of the father of the ward all the money that has been decreed against the estate of the guardian. The settlement established that fact as between the ward and the administrator of her father's estate, subject to the right to

surcharge and falsify. *Campbell's Adm'r v. White*, 14 W. Va. 122; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26; *Seabright v. Seabright*, 28 W. Va. 412; *Leach v. Buckner*, 19 W. Va. 36; *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. 478. As the administrator in that settlement charged himself with an estate amply sufficient to cover the amount of the decree, and had given a bond for the faithful discharge and performance of the trust, sufficient in amount, and with security approved by the court, it must be assumed *prima facie* that the ward's claim against him could have been collected by the exercise of due diligence.

In giving the report of the settlement this effect, we do not make it evidence of payment by the administrator to the guardian, but only to the fact that there existed a valid and solvent claim in favor of the ward. This fact so established, the law imposed upon the guardian a duty respecting the claim. His office and trust required him to take the custody and care of his ward's estate and preserve the same, and, after the lapse of a reasonable time, it presumes performance of this duty on his part, in the absence of a contrary showing made by him. Thus, when a debt is returned in an inventory of an executor, not noted as being either worthless or doubtful, it will be presumed, when the executor settles his accounts, after ample time has elapsed for him to have collected such debt, that he has in fact collected it in full, and he will be charged with it as having been collected when it ought to have been collected, unless he relieves himself by showing that it has not been collected, and why collection thereof has not been made. *Anderson v. Piercy*, 20 W. Va. 282, 325; *Estill v. McClintic's Adm'r*, 11 W. Va. 416; *Crouch v. Davis*, 23 Grat. (Va.) 100; *Dilliard v. Tomlinson*, 1 Munf. (Va.) 183; *Graham v. Davidson*, 22 N. C. 155; *Hickman v. Kamp's Adm'r*, 3 Bush (Ky.) 205; *Lawson v. Copeland*, 2 Bro. 156.

Prima facie an executor or other fiduciary is chargeable with all the assets and must account for them, but he may account by showing a loss which could not have been prevented by the exercise of due diligence and vigilance. *Van Winkle v. Blackford*, 54 W. Va. 621, 654, 46 S. E. 589.

There seems to be an apparent conflict in our decisions respecting the proposition above stated, since many of them say a fiduciary should not be charged with the amount of a note or other debt until he has collected the same, or it has been made to appear that it has been converted to his own use or lost by his negligence. *Hooper v. Hooper*, 32 W. Va. 541, 9 S. E. 937; *Holt v. Holt*, 46 W. Va. 397, 35 S. E. 19. It seems to me, however, that this conflict is only apparent, and not real. The decisions in which the latter proposition is asserted and applied dealt with settlements made by fiduciaries for the purpose of founding thereon decrees against them, and not their liability in general. Of course,

it would be improper to decree against an administrator, executor or guardian the amount of a valid debt remaining in his hands uncollected, since the debt is still enforceable against the debtor, and the estate for which the fiduciary has acted is not prejudiced otherwise than by delay, which is fully compensated by interest on the debt. Nor would it be proper to charge him personally with interest on an uncollected debt which is itself bearing interest in favor of the estate he represents.

But, when the question of ultimate and final liability arises, under the rule of law prescribing the whole duty of a fiduciary, it is to be determined by that rule, and not by minor, subsidiary rules which have to do only with the form of the settlement, or the amount of the money to be decreed, or the time from which interest shall be charged. The distinction is very important, for upon it depends the question whether the burden of proof, to show that the loss is due to the negligence of the fiduciary, rests upon him or upon the *cestui que* trust. The general principle of law, holding personal representatives and guardians to the duty of exercising care and diligence to collect and conserve the estate, necessarily casts upon them the burden of showing why claims, once established and shown to have existed, should not be charged to them; it clearly appearing that they have not been collected and have ceased to be collectible.

As has been already asserted, the evidence fully establishes the existence of an estate which it was the duty of the guardian to collect and preserve. He qualified about the time the administrator ascertained the amount due the ward, and presumably that he might take charge of some estate of hers, and she appears to have had no other estate than the sum due her from the administrator—a circumstances strongly importing that he had knowledge of this particular estate. A period of 50 years has elapsed since the duty devolved upon him. If the money has not been collected by him, payment thereof would now be presumed by reason of the long lapse of time, in the absence of a contrary showing. An effort to assert it against the estate of Seibert, or that of Cushwa, Seibert's administrator, would be presumptively futile for that reason. Therefore it may be safely said that, if the guardian did not collect it, he suffered it to be lost by his failure to proceed for the collection thereof when he should have done so, and his estate is for that reason, if for no other, clearly liable therefor. * * * Decree affirmed.

V. Same—Investments¹⁰

LAMAR v. MICOU.

(Supreme Court of United States, 1884. 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751.)

On November 23, 1850, W. W. Sims, of Savannah, Georgia, died leaving a widow and two infant daughters, Ann C. and Martha M. Sims. In 1853 the widow married R. M. Abercrombie, of Clifton, Richmond county, N. Y. On December 11, 1855, on the petition of Mrs. Abercrombie, G. B. Lamar, an uncle of Mrs. Sims, then living in Brooklyn, N. Y., was appointed guardian of the infants. As such guardian Lamar received \$5,166, belonging to each of his wards, and invested part of it in stock of the Bank of the Republic in New York and part of it in the Bank of Commerce of Savannah. These banks were paying good dividends.

The children resided with Mr. and Mrs. Abercrombie in Clifton, N. Y., and subsequently in Hartford, Connecticut; the guardian paying their board until the death of Mrs. Abercrombie in 1859. They were then by the guardian taken to Augusta, Georgia, and placed in the care of their paternal grandmother and their aunt. The aunt subsequently married Benj. H. Micou, of Montgomery, Alabama, and the children and their grandmother thereafter lived with Mr. and Mrs. Micou in Montgomery. From 1855 to 1859 Lamar resided partly in Georgia and partly in New York. In the spring of 1861 he had a temporary residence in the city of New York, and upon the breaking out of the war of the rebellion, and after removing all his own property, left New York, and passed through the lines to Savannah, and there resided, sympathizing with the rebellion, and doing what he could to accomplish its success, until January, 1865, and continued to have his residence in Savannah until 1872 or 1873, when he went to New York again, and afterwards lived there until his death in October, 1874.

At the time of Lamar's appointment as guardian, 10 shares in the stock of the Mechanics' Bank of Augusta, in the state of Georgia, which had belonged to William W. Sims in his life-time, stood on the books of the bank in the name of Mrs. Abercrombie as his administratrix, of which one-third belonged to her as his widow, and one-third to each of the infants. In January, 1856, the bank refused a request of Lamar to transfer one-third of that stock to him as guardian of each infant, but afterwards paid to him as guardian, from time to time, two-thirds of the dividends during

¹⁰ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 173, 174.

the life of Mrs. Abercrombie, and all the dividends after her death until 1865. During the period last named, he also received as guardian the dividends on some other bank stock in Savannah, which Mrs. Abercrombie owned, and to which, on her death, her husband became entitled. In the winter of 1861-62, Lamar, fearing that the stock in the Bank of the Republic at New York, held by him as guardian, would be confiscated by the United States, had it sold by a friend in New York; the proceeds of the sale, which were about 20 per cent. less than the par value of the stock, invested at New York in guarantied bonds of the cities of New Orleans, Memphis, and Mobile, and of the East Tennessee & Georgia Railroad Company; and those bonds deposited in a bank in Canada. Lamar from time to time invested the property of his wards, that was within the so-called Confederate States, in whatever seemed to him to be the most secure and safe—some in Confederate States bonds, some in the bonds of the individual states which composed the confederacy, and some in bonds of cities, and of railroad corporations, and stock of banks within those states. On the money of his wards, accruing from dividends on bank stock, and remaining in his hands, he charged himself with interest until the summer of 1862, when, with the advice and aid of Mr. Micou, he invested \$7,000 of such money in bonds of the Confederate States and of the state of Alabama; and in 1863, with the like advice and aid, sold the Alabama bonds for more than he had paid for them, and invested the proceeds also in Confederate States bonds; charged his wards with the money paid, and credited them with the bonds; and placed the bonds in the hands of their grandmother, who gave him a receipt for them and held them till the end of the rebellion, when they, as well as the stock in the banks at Savannah, became worthless.

Martha M. Sims died on November 2, 1864, at the age of 15 years, unmarried and intestate, leaving her sister Ann C. Sims her next of kin. This action was begun by Ann C. Sims as administratrix of Martha M. Sims, in 1875, against the defendant, as executor of the will of G. B. Lamar. On the death of Ann C. Sims in 1878, the suit was revived by Mrs. Micou, as administratrix de bonis non of the estate of Martha M. Sims. There was a decree for plaintiff for \$18,700, and defendant appealed.

GRAY, J.¹¹ * * * The general rule is everywhere recognized that a guardian or trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In some jurisdictions no attempt has been made to establish a more definite rule; in others, the discretion has

¹¹ Part of the opinion is omitted and the statement of facts is rewritten.

been confined, by the legislature or the courts, within strict limits. * * *

In this country there has been a diversity in the laws and usages of the several states upon the subject of trust investments.

In New York, under Chancellor Kent, the rule seems to have been quite undefined. See *Smith v. Smith*, 4 Johns. Ch. 281, 285; *Thompson v. Brown*, 4 Johns. Ch. 619, 628, 629. * * * And in *Brown v. Campbell*, Hopk. Ch. 233, where an executor in good faith made an investment, considered at the time to be advantageous, of the amount of two promissory notes, due to his testator from one manufacturing corporation, in the stock of another manufacturing corporation, which afterwards became insolvent, Chancellor Sanford held that there was no reason to charge him with the loss. But by the later decisions in that state investments in bank or railroad stock have been held to be at the risk of the trustee, and it has been intimated that the only investments that a trustee can safely make without an express order of court are in government or real estate securities. *King v. Talbot*, 40 N. Y. 76, affirming S. C. 50 Barb. 453; *Ackerman v. Emott*, 4 Barb. 626; *Mills v. Hoffman*, 26 Hun, 594; 2 Kent, Comm. 416, note b. So the decisions in New Jersey and Pennsylvania tend to disallow investments in the stock of banks or other business corporations or otherwise than in the public funds or in mortgages of real estate. *Gray v. Fox*, 1 N. J. Eq. 259, 268, 22 Am. Dec. 508; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Worrell's Appeal*, 9 Pa. 508, and 23 Pa. 44; *Hemphill's Appeal*, 18 Pa. 303; *Ihmsen's Appeal*, 43 Pa. 431. And the New York and Pennsylvania courts have shown a strong disinclination to permit investments in real estate or securities out of their jurisdiction. *Ormiston v. Olcott*, 84 N. Y. 339; *Rush's Estate*, 12 Pa. 375, 378.

In New England, and in the southern states, the rule has been less strict. In Massachusetts, by a usage of more than half a century, approved by a uniform course of judicial decision, it has come to be regarded as too firmly settled to be changed, except by the legislature, that all that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion, such as men of prudence and intelligence exercise in the permanent disposition of their own funds, having regard, not only to the probable income, but also to the probable safety, of the capital; and that a guardian or trustee is not precluded from investing in the stock of banking, insurance, manufacturing, or railroad corporations within or without the state. *Harvard College v. Amory*, 9 Pick. 446, 461; *Lovell v. Minot*, 20 Pick. 116, 119, 32 Am. Dec. 206; *Kinmonth v. Brigham*, 5 Allen, 270, 277; *Clark v. Garfield*, 8 Allen, 427; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Bowker v. Pierce*, 130 Mass. 262. In New Hampshire and in Vermont, investments, honestly and prudently made, in

securities of any kind that produce income, appear to be allowed. *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *Kimball v. Reding*, 31 N. H. 352, 374, 64 Am. Dec. 333; *French v. Currier*, 47 N. H. 88, 99; *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

In Maryland, good bank stock, as well as government securities and mortgages on real estate, has always been considered a proper investment. *Hammond v. Hammond*, 2 Bland, 306, 413; *Gray v. Lynch*, 8 Gill, 403; *Murray v. Feinour*, 2 Md. Ch. 418. So, in Mississippi, investment in bank stock is allowed. *Smyth v. Burns*, 25 Miss. 422.

In South Carolina, before the war, no more definite rule appears to have been laid down than that guardians and trustees must manage the funds in their hands as prudent men manage their own affairs. *Boggs v. Adger*, 4 Rich. Eq. 408, 411; *Spear v. Spear*, 9 Rich. Eq. 184, 201; *Snelling v. McCreary*, 14 Rich. Eq. 291, 300.

In Georgia the English rule was never adopted; a statute of 1845, which authorized executors, administrators, guardians and trustees, holding any trust funds, to invest them in securities of the state, was not considered compulsory; and before January 1, 1863 (when that statute was amended by adding a provision that any other investment of trust funds must be made under a judicial order, or else be at the risk of the trustee), those who lent the fund at interest, on what was at the time considered by prudent men to be good security, were not held liable for a loss without their fault. *Cobb*, Dig. 333; Code 1861, § 2308; *Brown v. Wright*, 39 Ga. 96; *Moses v. Moses*, 50 Ga. 9, 33.

In Alabama the supreme court in *Bryant v. Craig*, 12 Ala. 354, 359, having intimated that a guardian could not safely invest upon either real or personal security without an order of court, the legislature, from 1852, authorized guardians and trustees to invest on bond and mortgage, or on good personal security, with no other limit than fidelity and prudence might require. Code 1852, § 2024; Code 1867, § 2426; *Foscue v. Lyon*, 55 Ala. 440, 452.

The rules of investment varying so much in the different states, it becomes necessary to consider by what law the management and investment of the ward's property should be governed. As a general rule (with some exceptions not material to the consideration of this case) the law of the domicile governs the status of a person, and the disposition and management of his movable property. The domicile of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate; although, for the protection of either, a guardian may be appointed in any state where the person or any property of an infant may be found. On the continent of Europe, the guardian appointed in the state of the domicile of the ward is generally recognized as entitled to the control and dominion of the ward and his movable property everywhere, and guardians specially appointed in other

states are responsible to the principal guardian. By the law of England and of this country, a guardian appointed by the courts of one state has no authority over the ward's person or property in another state, except so far as allowed by the comity of that state, as expressed through its legislature or its courts; but the tendency of modern statutes and decisions is to defer to the law of the domicile, and to support the authority of the guardian appointed there. *Hoyt v. Sprague*, 103 U. S. 613, 631, 26 L. Ed. 585, and authorities cited; *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153; *Woodworth v. Spring*, 4 Allen (Mass.) 321; *Milliken v. Pratt*, 125 Mass. 374, 377, 378, 28 Am. Rep. 241; *Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106; *Com. v. Rhoads*, 37 Pa. 60; *Sims v. Renwick*, 25 Ga. 58; *Dicey*, Dom. 172-176; *Westl. Int. Law* (2d Ed.) 48-50; *Whart. Confl. Laws* (2d Ed.) §§ 259-268.

An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicile, change the domicile of the infants; the domicile of the children, in either case, following the independent domicile of their parent. *Kennedy v. Ryall*, 67 N. Y. 379; *Pottinger v. Wightman*, 3 Mer. 67; *Dedham v. Natick*, 16 Mass. 135; *Dicey*, Dom. 97-99. But when the widow, by marrying again, acquires the domicile of a second husband, she does not, by taking her children by the first husband to live with her there, make the domicile which she derives from the second husband their domicile; and they retain the domicile which they had, before her second marriage, acquired from her or from their father. *Cumner v. Milton*, 3 Salk. 259; S. C. Holt, 578; *Freetown v. Taunton*, 16 Mass. 52; *School Directors v. James*, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525; *Johnson v. Cope-land*, 35 Ala. 521; *Brown v. Lynch*, 2 Bradf. Sur. (N. Y.) 214; *Mears v. Sinclair*, 1 W. Va. 185; *Pot. Introduction Generale aux Coutumes*, No. 19; 1 *Burge*, Col. Law, 39; 4 *Phillim. Int. Law* (2d Ed.) § 97.

The preference due to the law of the ward's domicile, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property should be governed by the law of the state of his domicile, especially when he actually resides there, rather than by the law of any state in which a guardian may have been appointed or may have received some property of the ward. If the duties of the guardian were to be exclusively regulated by the law of the state of his appointment, it would follow that in any case in which the temporary residence of the ward was changed from state to state, from considerations of health, education, pleasure, or convenience, and guardians were appointed in each state, the guardians appointed in the different states, even if the same persons, might be held to

diverse rules of accounting for different parts of the ward's property. The form of accounting, so far as concerns the remedy only, must, indeed, be according to the law of the court in which relief is sought; but the general rule by which the guardian is to be held responsible for the investment of the ward's property is the law of the place of the domicile of the ward. *Bar. Int. Law*, § 106 (Gillespie's translation) p. 438; *Whart. Confl. Laws*, § 259.

It may be suggested that this would enable the guardian, by changing the domicile of his ward, to choose for himself the law by which he should account. Not so. The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicile, may change that domicile. But the ward does not derive a domicile from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the ward's domicile that the father had. *Wood v. Wood*, 5 *Paige* (N. Y.) 596, 605, 28 *Am. Dec.* 451. And any guardian, appointed in the state of the domicile of the ward, has been generally held to have the power of changing the ward's domicile from one county to another within the same state and under the same law. *Cutts v. Haskins*, 9 *Mass.* 543; *Holyoke v. Haskins*, 5 *Pick.* 20, 16 *Am. Dec.* 372; *Kirkland v. Whately*, 4 *Allen* (Mass.) 462; *Anderson v. Anderson*, 42 *Vt.* 350, 1 *Am. Rep.* 334; *Ex parte Bartlett*, 4 *Bradf. Sur.* (N. Y.) 221; *The Queen v. Whitby*, *L. R.* 5 *Q. B.* 325, 331. But it is very doubtful, to say the least, whether even a guardian appointed in the state of the domicile of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicile beyond the limits of the state in which the guardian is appointed, and to which his legal authority is confined. *Douglas v. Douglas*, *L. R.* 12 *Eq.* 617, 625; *Daniel v. Hill*, 52 *Ala.* 430; *Story, Confl. Laws*, § 506, note; *Dicey, Dom.* 100, 132. And it is quite clear that a guardian appointed in a state in which the ward is temporarily residing, cannot change the ward's permanent domicile from one state to another. The case of such a guardian differs from that of an executor of, or a trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment. The executor or trustee is appointed at the domicile of the testator; the guardian is most fitly appointed at the domicile of the ward, and may be appointed in any state in which the person or any property of the ward is found. The general rule which governs the administration of the property in the one case may be the law of the domicile of the testator; in the other case, it is the law of the domicile of the ward.

As the law of the domicile of the ward has no extraterritorial effect, except by the comity of the state where the property is

situated, or where the guardian is appointed, it cannot, of course, prevail against a statute of the state in which the question is presented for adjudication, expressly applicable to the estate of a ward domiciled elsewhere. *Hoyt v. Sprague*, 103 U. S. 613, 26 L. Ed. 585. Cases may also arise with facts so peculiar or so complicated as to modify the degree of influence that the court in which the guardian is called to account may allow to the law of the domicile of the ward, consistently with doing justice to the parties before it. And a guardian, who had in good faith conformed to the law of the state in which he was appointed, might, perhaps, be excused for not having complied with stricter rules prevailing at the domicile of the ward. But in a case in which the domicile of the ward has always been in a state whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exercised that discretion with a view to the pecuniary interests of the ward, it would be inconsistent with the principles of equity to charge him with the amount of the moneys invested, merely because he has not complied with the more rigid rules adopted by the courts of the state in which he was appointed.

The domicile of William W. Sims, during his life and at the time of his death in 1850, was in Georgia. This domicile continued to be the domicile of his widow and of their infant children until they acquired new ones. In 1853 the widow, by marrying the Rev. Mr. Abercrombie, acquired his domicile. But she did not, by taking the infants to the home, at first in New York and afterwards in Connecticut, of her new husband, who was of no kin to the children, was under no legal obligation to support them, and was, in fact, paid for their board out of their property, make his domicile, or the domicile derived by her from him, the domicile of the children of the first husband. Immediately upon her death in Connecticut, in 1859, these children, both under 10 years of age, were taken back to Georgia to the house of their father's mother and unmarried sister, their own nearest surviving relatives; and they continued to live with their grandmother and aunt in Georgia until the marriage of the aunt in January, 1860, to Mr. Micou, a citizen of Alabama, after which the grandmother and the children resided with Mr. and Mrs. Micou at their domicile in that state.

Upon these facts, the domicile of the children was always in Georgia from their birth until January, 1860, and thenceforth was either in Georgia or in Alabama. As the rules of investment prevailing before 1863 in Georgia and in Alabama did not substantially differ, the question in which of those two states their domicile was is immaterial to the decision of this case; and it is therefore unnecessary to consider whether their grandmother was their natural guardian, and as such had the power to change their domicile from one state to another. See Hargrave's note 66 to Co.

Litt. 88b; Reeve, Dom. Rel. 315; 2 Kent, Comm. 219; Code Ga. 1861, §§ 1754, 2452; Darden v. Wyatt, 15 Ga. 414. Whether the domicile of Lamar in December, 1855, when he was appointed in New York guardian of the infants, was in New York or in Georgia, does not distinctly appear, and is not material; because, for the reasons already stated, wherever his domicile was, his duties as guardian in the management and investment of the property of his wards were to be regulated by the law of their domicile.

It remains to apply the test of that law to Lamar's acts or omissions with regard to the various kinds of securities in which the property of the wards was invested.

1. The sum which Lamar received in New York in money from Mrs. Abercrombie he invested in 1856 and 1857 in stock of the Bank of the Republic at New York, and of the Bank of Commerce at Savannah, both of which were then, and continued till the breaking out of the war, in sound condition, paying good dividends. There is nothing to raise a suspicion that Lamar, in making these investments, did not use the highest degree of prudence; and they were such as by the law of Georgia or of Alabama he might properly make. Nor is there any evidence that he was guilty of neglect in not withdrawing the investment in the stock of the Bank of Commerce at Savannah before it became worthless. He should not, therefore, be charged with the loss of that stock. The investment in the stock of the Bank of the Republic of New York being a proper investment by the law of the domicile of the wards, and there being no evidence that the sale of that stock by Lamar's order in New York, in 1862, was not judicious, or was for less than its fair market price, he was not responsible for the decrease in its value between the times of its purchase and of its sale. He had the authority, as guardian, without any order of court, to sell personal property of his ward in his own possession, and to reinvest the proceeds. *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243. That his motive in selling it was to avoid its being confiscated by the United States does not appear to us to have any bearing on the rights of these parties. And no statute under which it could have been confiscated has been brought to our notice. The act of July 17, 1862, c. 195, § 6, cited by the appellant, is limited to property of persons engaged in or abetting armed rebellion, which could hardly be predicated of two girls under 13 years of age. 12 Stat. 591. Whatever liability, criminal or civil, Lamar may have incurred or avoided as towards the United States, there was nothing in his selling this stock, and turning it into money, of which his wards had any right to complain.

As to the sum received from the sale of the stock in the Bank of the Republic, we find nothing in the facts agreed by the parties, upon which the case was heard, to support the argument that

Lamar, under color of protecting his wards' interests, allowed the funds to be lent to cities and other corporations which were aiding in the rebellion. On the contrary, it is agreed that that sum was applied to the purchase in New York of guarantied bonds of the cities of New Orleans, Memphis, and Mobile, and of the East Tennessee & Georgia Railroad Company; and the description of those bonds, in the receipt afterwards given by Micou to Lamar, shows that the bonds of that railroad company, and of the cities of New Orleans and Memphis, at least, were issued some years before the breaking out of the rebellion, and that the bonds of the city of Memphis and of the railroad company were, at the time of their issue, indorsed by the state of Tennessee. The company had its charter from that state, and its road was partly in Tennessee and partly in Georgia. St. Tenn. 1848, c. 169. Under the discretion allowed to a guardian or trustee by the law of Georgia and of Alabama, he was not precluded from investing the funds in his hands in bonds of a railroad corporation, indorsed by the state by which it was chartered, or in bonds of a city. As Lamar, in making these investments, appears to have used due care and prudence, having regard to the best pecuniary interests of his wards, the sum so invested should be credited to him in this case, unless, as suggested at the argument, the requisite allowance has already been made in the final decree of the circuit court in the suit brought by the representative of the other ward, an appeal from which was dismissed by this court for want of jurisdiction in 104 U. S. 465, 26 L. Ed. 774.

2. Other moneys of the wards in Lamar's hands, arising either from dividends which he had received on their behalf, or from interest with which he charged himself upon sums not invested, were used in the purchase of bonds of the Confederate States, and of the state of Alabama. The investment in bonds of the Confederate States was clearly unlawful, and no legislative act or judicial decree or decision of any state could justify it. The so-called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States. The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested. *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361; *Head v. Starke*, Chase, 312, Fed. Cas. No. 6,293; *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *Confederate Note Case*, 19 Wall. 548, 22 L. Ed. 196; *Sprott v. United States*, 20 Wall. 459, 22 L. Ed. 371; *Fretz v. Stover*, 22 Wall. 198, 22 L. Ed. 769; *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. 107, 28 L. Ed. 195. An infant has no capacity, by

contract with his guardian, or by assent to his unlawful acts, to affect his own rights. The case is governed in this particular by the decision in *Horn v. Lockhart*, in which it was held that an executor was not discharged from his liability to legatees by having invested funds, pursuant to a statute of the state, and with the approval of the probate court by which he had been appointed, in bonds of the Confederate States, which became worthless in his hands. Neither the date nor the purpose of the issue of the bonds of the state of Alabama is shown, and it is unnecessary to consider the lawfulness of the investment in those bonds, because Lamar appears to have sold them for as much as he had paid for them, and to have invested the proceeds in additional Confederate States bonds, and for the amount thereby lost to the estate he was accountable.

3. The stock in the Mechanics' Bank of Georgia, which had belonged to William W. Sims in his life-time, and stood on the books of the bank in the name of his administratrix, and of which one-third belonged to her, as his widow, and one-third to each of the infants, never came into Lamar's possession; and upon a request made by him, the very next month after his appointment, the bank refused to transfer to him any part of it. He did receive and account for the dividends; and he could not, under the law of Georgia concerning foreign guardians, have obtained possession of property of his wards within that state without the consent of the ordinary. Code 1861, §§ 1834-1839. The attempt to charge him for the value of the principal of the stock must fail for two reasons: First. This very stock had not only belonged to the father of the wards in his life-time, but it was such stock as a guardian or trustee might properly invest in by the law of Georgia. Second. No reason is shown why this stock, being in Georgia, the domicile of the wards, should have been transferred to a guardian who had been appointed in New York during their temporary residence there. The same reasons are conclusive against charging him with the value of the bank stock in Georgia, which was owned by Mrs. Abercrombie in her own right, and to which Mr. Abercrombie became entitled upon her death. It is therefore unnecessary to consider whether there is sufficient evidence of an immediate surrender by him of her interest to her children.

The result is that both the decrees of the circuit court in this case must be reversed, and the case remanded for further proceedings in conformity with this opinion.

5/17/25

TERMINATION OF GUARDIANSHIP—ENFORCING GUARDIAN'S LIABILITY

I. Guardians' Bonds ¹

BISBEE v. GLEASON.

(Supreme Court of Nebraska, 1887. 21 Neb. 534, 32 N. W. 578.)

REESE, J.² This action was commenced in the district court by defendant in error, in which he sought to recover a judgment for \$1,900 and interest, against E. M. Bisbee as principal, and the other defendants in the action as sureties, upon a guardian's bond executed by them in favor of defendant in error, as the ward of said Bisbee. Plaintiffs in error demurred to the petition upon the ground that it did not state facts sufficient to state a cause of action. The demurrer was overruled. Plaintiffs in error refused to answer over, and judgment was rendered against them for \$2,615.05, the amount found due upon the bond. The error assigned is that the district court erred in overruling the demurrer. * * *

The petition contains no averment that any settlement with the guardian had ever been made by the county court, nor that any sum had ever been found due plaintiff by that tribunal. Substantially the same question presented here was before this court in *Ball v. La Clair*, 17 Neb. 39, 22 N. W. 118, and it was there held that a right of action upon a guardian's bond first accrued to the ward when the amount remaining in the hands of the guardian is ascertained by the county court on the final settlement of the guardian's account. This, we think, correctly states the law.

Section 9 of chapter 34 of the Compiled Statutes of 1885 provides that "every such guardian shall give a bond, with surety or sureties, to the judge of probate, in such sum as the court shall order, with condition as follows: * * * Fourth, at the expiration of his trust to settle his accounts with the court, or with the ward, or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands, or due from him on such settlement to the person or persons lawfully entitled thereto."

We need not here copy the provisions of the constitution and statutes of the state which confer exclusive jurisdiction upon the

¹ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 189-191.

² Part of the opinion is omitted.

county courts in all matters relating to the settlement of the accounts of guardians, as they are fully set out in the opinion of the court in *Ball v. La Clair*, written by the then Chief Justice Cobb; and, in so far as that decision is applicable to the case at bar, we shall be content with it as fully stating the law, and meeting all the requirements of the case. But it is claimed that, since it is alleged in the petition in this case that plaintiff in error, Bisbee, was cited to a settlement by the county judge, and refused to obey the citation, the case is brought directly within the language of the opinion in *Ball v. La Clair*, wherein the writer thereof says that the liability of a guardian "to a suit in a court of law for the balance due her wards on her guardianship account, and certainly the liability of the sureties, would arise only upon her refusal or failure to obey some order of the county court in that behalf." We do not so understand the meaning of the language referred to. To the mind of the writer, the meaning clearly is that the county court had jurisdiction to cite the guardian to a settlement, and, when such settlement was made, to order such guardian "to pay into court, or to pay over to her late wards, such sum as should be found due them upon such settlement;" or, in other words, if either order was made and not complied with, the action could be maintained, and not otherwise.

Neither do we think that the fourth clause quoted from section 9 of chapter 34 can be so construed as to confer the right to sue without such settlement having first been made. Substantially the same language occurs in the statutes of California; and in *Allen v. Tiffany*, 53 Cal. 16, it was held that no action could be maintained until after the settlement was made. In the opinion it is said: "Within a reasonable time after the ward arrives at full age, the statute provides that the guardian may settle his accounts with the ward; but, considering the previous relations of the parties, it is not to be supposed that it was the intention that such settlement should, of itself, constitute a discharge, or that it should not be subject to the approval or disapproval of the probate judge prior to the discharge by him. The probate judge has the exclusive jurisdiction to determine the state of accounts between the guardian and ward. The ward may agree upon a settlement with his guardian, subject to the approval of the probate judge, or may apply for a citation compelling the guardian to settle his accounts before the probate judge. But to hold that, prior to such accounting before the probate judge, or to his order approving the settlement in pais, the ward may bring suit in the district court for a supposed balance, would destroy the symmetry and efficiency of the system furnished by our law for the appointment and conduct of guardians of infants." To the same effect, see, also, *Newton v. Hammond*, 38 Ohio St. 430, and cases there cited.

But it is said that the county court cited plaintiff in error Bisbee to appear and settle his accounts, and that he ignored the citation, and no settlement could be made, and that for that reason this action should be maintained. We can see no sufficient reason for such conclusion. As we have seen, the county court not only has the authority to require settlements to be made, but it has exclusive jurisdiction in such matters. It is true that a guardian may ignore the citation to settle, but it is equally true that the county court has full power to examine into his accounts, and charge him with a balance, after such citation, in his absence as in his presence. It also has all the facilities that any court has for bringing evidence before it, and can just as well settle the accounts of a guardian upon default as can the district court. It has the same power to compel the attendance of witnesses as the district court, and its powers in that behalf are just as extensive. But the provision of the statute giving the exclusive jurisdiction to the county court must be decisive of the whole question, without reference to any other consideration.

The judgment of the district court is therefore reversed, the demurrer sustained, and the cause remanded for further proceedings.

MITCHELL v. KELLY.

(Supreme Court of Kansas, 1910. 82 Kan. 1, 107 Pac. 782, 136 Am. St. Rep. 97.)

Action by Hillis S. Mitchell, guardian of Leanna Taylor and others, against S. J. Kelly, administrator of Henry A. Taylor. A demurrer to the petition was sustained, and plaintiff appeals.

BURCH, J.⁸ The question in this case relates to the liability of a surety on the bond of a guardian for minor children. The petition charged that a deceased guardian converted money belonging to his wards to his own use, became insolvent, and died without an accounting. The surety on the bond demurred on the ground that a settlement of the guardian's accounts in the probate court is a condition precedent to recovery against him. The demurrer was sustained, and the present guardian, who brought the action, appeals.

The statute relating to guardians and wards (chapter 46, Gen. St. 1901) requires that the property of a minor shall be managed by a guardian who upon due appointment and qualification shall take charge of it for that purpose. Section 7 reads as follows: "Guardians appointed to take charge of the property of the minor must give bond, with surety to be approved by the court, in a pen-

⁸ Part of the opinion is omitted.

alty double the value of the personal estate and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardian according to law. They must also take an oath of the same tenor as the condition of the bond."

The bond given in this case was conditioned as follows: "The condition of the above bond is that if Henry A. Taylor, guardian of the estate of Leanna, Richard M., and Edward S. Taylor, minors, shall faithfully discharge his duties as guardian, according to law, account for, pay, and deliver all money and property of said estate, and perform all other things touching said guardianship required by law, or the order or decree of any court having jurisdiction, then the above bond to be void, otherwise to remain in full force."

The very situation which this bond was given to meet is presented. The guardian used up the money of his infant wards, is dead, and left no estate from which they may be reimbursed. His sureties must pay, and the enforcement of their liability ought not to be fettered by rules based upon any considerations except those of substance.

The district court possesses both law and equity powers which may be exercised in the same proceeding. It has general jurisdiction to investigate accounts and to ascertain and declare balances due, and it possesses the common-law powers always exercised by chancery courts to settle guardians' accounts. Its methods and rules of procedure are as well calculated to attain just results as are those of the probate court. A finding of a balance due from the defunct guardian and of facts making the equivalent of a default must precede a judgment holding the surety liable. It is no detriment to the surety that he is a party to the preliminary inquiry, and may actively participate in it.

There is no statute forbidding the district court to act, and why should it refuse to do so? The only reason offered is that by analogy the procedure usually followed in cases of defaulting executors and administrators should be adopted. The analogy is destroyed by this fact. Administration is a definite proceeding to a definite end, the collection of assets, the payment of debts, and the distribution of the residue. To accomplish this purpose, the probate court has full possession of the entire subject-matter. All results are to be worked out there, and to invoke the jurisdiction of the district court with reference to the estate's accounts is to interfere with the due and orderly conduct of a pending proceeding.

In no sense is this true in cases of guardianship terminated by the death of the guardian. The guardian is a managing agent for his ward, nobody is interested in his conduct except the ward, and his duty is primarily to account to the ward rather than to the

court. This fact is made clear by the omission from the statute of any provision for a final settlement, as of the estate of a deceased person. The ward, on reaching his majority, may settle with the guardian as he pleases. When the guardian dies, the trust does not pass to his executor or administrator. His personal representative stands toward the ward as any third person having money or property of the ward in his possession. There is nothing like a pending cause before the probate court to be broken into, and no substantial reason is apparent why the new guardian may not bring his action in the district court.

The authorities are divided upon this question (21 Cyc. 240), and the court adopts the view which seems to accord best with the statutes and legal policy of this state. * * * Judgment reversed.

PART IV

INFANTS, PERSONS NON COMPOTES MENTIS, AND ALIENS

INFANTS

I. Infancy Defined¹

STATE v. CLARKE.

(Court of General Sessions of Delaware, 1840. 3 Har. 557.)

The defendant was presented by the grand jury for illegal voting at the late inspector's election. The presentment set forth these facts, to wit: That the defendant was born on the 7th of October, A. D. 1819, and voted at the election held on the 6th of October, 1840, upon age.

In his behalf a motion was now made to quash the presentment, on the ground that it appeared from the face of it that the defendant was of full age at the time he voted, and was, therefore, not guilty. It was proved that he stated the facts to the judges of the election, a majority of whom decided that he had a right to vote.

BAYARD, C. J. Many persons suppose that the expression in the constitution relative to the qualifications of voters is that citizens between the ages of twenty-one and twenty-two years shall be entitled to vote without paying tax; and on this the common, but erroneous, notion is that a man must be in point of fact actually within his twenty-second year, before he can vote. The premises and conclusion are both wrong. "Every free white male citizen of the age of twenty-one years, and under the age of twenty-two years, having resided as aforesaid, shall be entitled to vote without payment of any tax." Const. art. 4, § 1. To ascertain when a man is legally "of the age of twenty-one years," we must have reference to the common law, and those legal decisions which from time immemorial have settled this matter, in reference to all the important affairs of life. When can a person make a valid will;

¹ For discussion of principles see Tiffany, Persons & Dom. Rel. (3d Ed.) § 192.

when can he execute a deed for land; when make any contract or do any act which a *man* may do, and an *infant*, that is, a person under the age of twenty-one years, cannot do? On this question the law is well settled; it admits of no doubt. A person is "of the age of twenty-one years" the day *before* the twenty-first anniversary of his birth day. It is not necessary that he shall have entered upon his birth day, or he would be more than twenty-one years old. He is, therefore, of age the day before the anniversary of his birth; and, as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birth day; and upon any and every moment of that day may do any act which any man may lawfully do. 1 Chit. Gen. Prac. 766. "It is to be observed, that a person becomes of age on the first instant of the last day of the twenty-first year *next before* the anniversary of his birth; thus, if a person were born at any hour of the 1st of January, A. D. 1801 (even a few minutes before 12 o'clock of the night of that day), he would be of full age at the first instant of the 31st of December, A. D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours and minutes; because there is not in law in this respect any fraction of a day; and it is the same whether a thing is done, upon one moment of the day or another."

On the face then of this presentment, it appears that Mr. Clarke was entitled to vote on the 6th of October, being on that day of the age of twenty-one years; and the presentment, showing no offence, must be quashed.

II. Privileges and Disabilities ²

1. CAPACITY TO SUE AND DEFEND

BERNARD v. PITTSBURGH COAL CO.

(Supreme Court of Michigan, 1904. 137 Mich. 279, 100 N. W. 396.)

Action by Frank Bernard, Jr., by his next friend, against the Pittsburgh Coal Company. From a judgment for plaintiff, the defendant brings error.

CARPENTER, J.³ * * * * When this suit was commenced, plaintiff was a minor, and it was brought in his name by his father as

² For discussion of principles see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 194-198.

³ Part of the opinion is omitted.

next friend. When the trial occurred plaintiff had reached his majority, and it is insisted that the suit cannot be prosecuted under the original declaration. It is well settled that plaintiff, on arriving at his majority, may, if he elects, prosecute a suit commenced when he was a minor by his next friend. See *Tucker v. Wilson*, 68 Miss. 693, 9 South. 898; *Clements v. Ramsey*, 4 S. W. 311, 9 Ky. Law Rep. 172; *Reed v. Lane*, 96 Iowa, 454, 65 N. W. 380; *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243; *Sims v. Renwick*, 25 Ga. 58; *Holmes v. Adkins*, 2 Ind. 398; *Shuttleworth v. Hughey*, 6 Rich. (S. C.) 329, 60 Am. Dec. 130. It seems proper in such a case by a formal amendment of the record to show that the suit is prosecuted by plaintiff himself. This may be done either by striking out the name of the next friend (see *Sims v. Renwick*; *Lasseter v. Simpson*, *supra*) or by a suggestion of record that plaintiff has attained his full age (see *Shuttleworth v. Hughey*; *Clements v. Ramsey*, *supra*).

We should not, however, reverse a judgment for a failure to make such an amendment, which it seems may be made as a matter of course (see *Clements v. Ramsey*, *supra*), unless that failure was in some manner prejudicial to defendant. As the record stands, it indicates that the next friend, and not plaintiff himself, is responsible for any costs that might be awarded defendant. See *Holmes v. Adkins*, *supra*. If, therefore, defendant had prevailed in this suit, it might possibly have contended that its right to collect its costs from plaintiff was prejudiced by the failure to make the amendment under consideration, though it is probable that in that case its rights would have been protected by an amendment *nunc pro tunc*. But, as plaintiff recovered judgment and costs, we are unable to see how defendant was in any manner prejudiced.

We do not think that the record contains any error, or that any other complaint of the defendant demands discussion. The judgment of the circuit court is affirmed, with costs.

WEAVER et al. v. GLENN.

(Supreme Court of Appeals of Virginia, 1905. 104 Va. 443, 51 S. E. 835.)

Action by J. C. Glenn against Mary F. Weaver and others. Judgment for plaintiff. Defendants bring error.

WHITTLE, J. This action of ejectment was brought by the defendant in error against the plaintiffs in error to recover the land described in the declaration. At the trial the defendants, without waiving any of their rights, agreed with the plaintiff to submit all matters of law and fact to the determination of the court, where-

upon a joint judgment was rendered against them for the land in controversy and costs.

It appears that four out of the five claimants of the property in fee simple are infants, and that no guardian ad litem was appointed to defend them, which omission constitutes the first assignment of error.

In every action or suit against an infant defendant, it is the duty of the court wherein the same is pending, or of the judge or clerk thereof in vacation, to appoint a guardian ad litem to represent the interest or estate of the infant. Code Va. 1904, p. 1714, § 3255.

"So necessary is the appointment of a guardian ad litem esteemed," says Mr. Minor, "that although the process against an infant is issued and executed against him just as against an adult, and the declaration or bill setting forth the complaint is framed and filed in like manner, yet, after the declaration or bill is filed, no rule or any proceeding whatever can be had lawfully until a guardian is designated, and any step that is taken will be void as to the infant." 1 Minor, Inst. (2d Ed.) 432; 1 Barton's Law Pr. 206.

In *Turner v. Barraud*, 102 Va. 324, 46 S. E. 318, this court held: "The only way known to our law of bringing an infant before a court is by a guardian ad litem, appointed to conduct his defense for him. If he has appeared in a suit by a guardian ad litem regularly appointed for that purpose, he cannot afterwards, in an independent suit, impeach a decree rendered against him for errors and irregularities in the proceedings in the suit in which the decree was rendered; but, if no guardian ad litem was appointed or recognized by the court, he is not bound by the action of one who assumed to act for him, and the decree against him is void, and may be collaterally assailed."

In the yet more recent case of *Langston v. Bassette*, 104 Va. 47, 51 S. E. 218, it is said: "As an infant can only appear and defend by guardian ad litem, proceedings against him are generally fatally defective unless the record shows that a guardian ad litem was assigned him. Code 1887, § 3255 (Code Va. 1904, p. 1714). See *Roberts v. Stanton*, 2 Munf. 129, 5 Am. Dec. 463; *Cole v. Pennell*, 2 Rand. 174; *Parker v. McCoy*, 10 Grat. 594; *Ewing's Adm'r v. Ferguson's Adm'r*, 33 Grat. 548; *Turner v. Barraud*, 102 Va. 324, 331, 46 S. E. 318; note to *Caperton v. Gregory*, 11 Grat. (Michie's Ed.) at page 251 et seq., where a number of cases on the subject are collected."

The omission to appoint a guardian ad litem for an infant defendant is reversible error in all cases, unless it appears that the judgment or decree is for the infant, and not to his prejudice. Code Va. 1904, p. 1830, § 3449; *Langston v. Bassette*, *supra*.

Without passing upon any other assignment, we are of opinion

that for this initial error the judgment complained of must be reversed, and the case remanded for further proceedings to be had therein in conformity with this opinion.*

III. Contracts of Infants⁵

COURSOLLE v. WEYERHAUSER.

(Supreme Court of Minnesota, 1897. 69 Minn. 328, 72 N. W. 697.)

Action by Henry Coursolle against Frederick Weyerhauser and others to determine adverse claims to land. The plaintiff is a half-blood of the Sioux tribe. In 1856, under the act of congress of July 17, 1854 (10 Stat. 304, c. 83), there was issued to him what was known as "half-breed scrip" for 320 acres of land. In January, 1870, when he was about 20 years old, he executed a power of attorney appointing one Dorr his attorney to select and locate the lands he was entitled to by reason of the scrip, and by another power of attorney gave Dorr authority to sell and convey such lands. Assuming to act under these powers Dorr located certain lands and subsequently sold and conveyed them to Brown. The entry of the lands having been canceled by the commissioner of the general land office on the ground of the infancy of the holder of the scrip, plaintiff in 1878 executed another power of attorney authorizing Brown to locate the scrip. Brown by virtue of this power relocated the scrip on the same lands. Defendants claim under successive conveyances under Brown. There was judgment for defendants, and plaintiff appeals.

MITCHELL, J.⁶ * * * We are of the opinion that the doctrine of ratification is applicable. Two defects in the Brown title were: First, that plaintiff was a minor when he executed to Dorr the power of attorney to sell and convey the land; and, second, that the conveyance was not authorized by the power, because the land had not then been entered with the scrip. We are of the opinion that plaintiff, by his conduct, had fully ratified both the power of attorney and the deed assumed to be executed under it—at least, as to both these defects. As respects the fact that the conveyance before the entry of the land was unauthorized by the power, there is no difficulty in holding that the conveyance was subsequently ratified by plaintiff's conduct.

* Compare *Grauman, Marx & Cline Co. v. Krienitz*, post, p. 251.

⁵ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) § 199.

⁶ Part of the opinion is omitted and the statement of facts is rewritten.

We are not unmindful of the general rule that the form of ratification should be the same as required for the original appointment; but until the amendment of Gen. St. 1878, c. 41, § 12 (Gen. St. 1894, § 4215), in 1887, the authority of an agent to make a contract for the sale of land was not required to be in writing. *Dickerman v. Ashton*, 21 Minn. 538; *Brown v. Eaton*, 21 Minn. 409. And, where an agent authorized to contract to sell conveys under a defective power, the deed will be treated as a good contract to sell. *Minor v. Willoughby*, 3 Minn. 225 (Gil. 154); *Hersey v. Lambert*, 50 Minn. 373, 52 N. W. 963. Ratification may be implied from the principal's acts, and from silence and nonaction as well as from affirmative words and acts. The execution of the power of attorney in 1878 to relocate the scrip for the purpose of protecting Brown's title, after being fully advised of all the facts, followed by an entire omission for 17 years to assert by word or act any claim to the land, or to repudiate what had been done in his name, constituted a ratification on plaintiff's part of what had been done, as far as those things were capable of ratification.

The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains—which to our minds is the most important one in the case—whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void.

This exception does not seem to be founded on any sound principle, and all the text-writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact. On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable,

as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time. The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. See Freeman's note to *Craig v. Van Bebber*, 18 Am. St. Rep. 629 (s. c., 100 Mo. 584, 13 S. W. 906); *Schouler, Dom. Rel.* § 406; *Ewell's Lead. Cas.* 44, 45, and note; *Bish. Cont.* § 930; *Metc. Cont.* (2d Ed.) 48; *Whitney v. Dutch*, 14 Mass. 457-463, 7 Am. Dec. 229; *Bool v. Mix*, 17 Wend. (N. Y.) 119-131, 31 Am. Dec. 285.

Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority. * * * Judgment affirmed.

GRAUMAN, MARX & CLINE CO. v. KRIENITZ.

(Supreme Court of Wisconsin, 1910. 142 Wis. 556, 126 N. W. 50.)

Action by the Grauman, Marx & Cline Company against Harry W. Krienitz, impleaded, etc. From an order denying application to vacate a default judgment against defendant Krienitz, he appeals. The action was to recover on a promissory note upon which appellant was an accommodation maker. No answer was served, and judgment by default was taken in due course. Nothing appeared of record indicating that appellant was a minor. Execution was duly issued on the judgment and returned unsatisfied. Several months after judgment, supplementary proceedings were commenced against appellant, whereupon he appeared and secured appointment of a guardian ad litem to represent him and institute and carry on due proceedings to open the default and obtain leave to defend. A motion was duly made to vacate the judgment. Upon such motion defendant tendered an answer, pleading that he signed the note as an accommodation maker, only, and that he was a minor at the time of so signing and still was such.

The motion was supported by affidavits on defendant's behalf that he, at first, became a guarantor for his codefendant at the request of her husband; that later, when the indebtedness incurred on the faith of the guaranty, amounting to some \$472, became due, defendant was asked by plaintiff's attorney to settle therefor; that defendant then claimed he was not liable because he was a minor; that, as a result of some negotiations, the claim was settled by the note in suit, signed by defendant as an accommodation maker and a personal note of the principal debtor for the balance.

The affidavits tended strongly to show that the settlement was made, and guaranty surrendered to defendant on the faith of his representation, by conduct, or words that he had arrived at the age of 21 years. Whether he expressly so represented was disputed, the preponderance of proof being in the negative. There was a conflict as to whether defendant represented himself to be of age when the guaranty was signed, but the preponderance of proof was in the negative. The affidavits showed that plaintiff supposed, and had reasonable ground to suppose, defendant was of age when he signed the guaranty. No benefits whatever came to defendant, at any time, for signing either guaranty or note.⁷

MARSHALL, J. The situation, in brief, stating it as favorably for respondent as the moving papers will reasonably permit of, is this: Respondent and its agent believed, as above indicated, that when appellant signed the guaranty, he was of age, and, so believing, accepted him as security for payment of the indebtedness afterwards incurred. It did not, at the time the note was given, concede that he was not liable on the guaranty. When the note was signed respondent's agent believed that, if appellant were not of age in the first instance he had arrived at his majority in the meantime. Respondent in the last instance, as in the first, was led to do what it did, by appellant, either by express declaration or otherwise, suggesting that he was of age and, manifestly, for the purpose of inducing the former to so believe. Respondent relied upon such belief in all that it did to enforce collection of the claim up to the time appellant claimed, in the supplementary proceeding, that he was still in his minority. It incurred danger of loss by selling goods on the faith of the guaranty and incurred loss to a considerable amount in reliance upon the note, if he shall be heard, successfully, to claim he was a minor when he signed the paper and when he petitioned for leave to defend against the same notwithstanding the judgment. If he were an adult his laches after service of the summons would justify the refusal to grant relief.

An application to set aside a default, in a case of this sort, notwithstanding the minority of appellant, is addressed to the sound discretion of the court, but such discretion must be guided by the

⁷ The statement of facts is rewritten.

settled policy of the law, that a person under disability is entitled to reasonable opportunity to be heard in court by a qualified representative during his disability, or by himself after the disability shall have been removed. Such exceptions as there are to such policy are so rare that the rule is well nigh universal. So, whether the trial court failed to exercise its discretion, in this instance, either because of misconception, or abused it by a too severe an application, of the law, or by misconceiving the effect of the facts, must be answered from the standpoint of the well-settled policy referred to.

That a minor defendant should be represented by a guardian ad litem, is too familiar to require to be more than stated. It is laid down in the elementary works thus: "It is an almost universal rule that where an infant is a defendant a guardian ad litem must be appointed for him to conduct the defense. The reason of this rule is plain, for it is evident that the privileges of an infant with regard to contracts and other transactions would be of slight utility if he were liable to be dragged into court and exposed there, unprotected in his ignorance, to contend with learning and experience. It is to protect him against such danger that the law assigns him a guardian in the suit." Ency. P. & P. 618.

Going back to the guaranty on the note, it is conceded, as the fact is, that the contract of a minor, other than for necessaries, is either void or voidable at his option, exercised within a reasonable time after his coming of age. Such a contract, not for necessaries, is, as a rule, voidable by the minor at his option, reasonably exercised, upon his coming of age and restoring the former situation as far as he is reasonably capable of doing so. There is an exception to that, generally recognized by the courts, including our own, of which *Knaggs v. Green*, 48 Wis. 601, 4 N. W. 760, 33 Am. Rep. 838, and *Thormaehlen v. Kaeppel*, 86 Wis. 378, 56 N. W. 1089, are illustrations. That is this, a minor may, in making a contract beneficial to himself, under some circumstances, preclude himself, by equitable estoppel, from subsequently avoiding it on the ground of his infancy. The basic circumstance rendering that applicable is actual fraud; express representation of capacity to contract, inducing the adverse party to enter into the agreement. Many illustrative cases are cited in the brief of counsel for respondent. The following are a few of them, and others: *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511; *Commander v. Brazil*, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117; *Ostrander v. Quinn*, 84 Miss. 230, 36 South. 257, 105 Am. St. Rep. 426; *Whittington v. Wright*, 9 Ga. 23; *Sanger v. Hibbard*, 2 Ind. T. 547, 53 S. W. 330; *Steed v. Petty*, 65 Tex. 490; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Harmon v. Smith* (C. C.) 38 Fed. 482.

An examination of the cited cases will demonstrate that the rule that an infant may bind himself by his actual fraud, but not by mere conduct or silence when he ought to speak, is very guarded. It forms an exception to the one that an infant or other person under disability cannot bind him or herself by estoppel. It is confined to cases where the infant, though under legal discretion, is in fact developed to the condition of actual discretion. It is further confined to cases of actual fraud and where the contract or transaction is beneficial to the minor. The rule being purely of equitable nature, it may be that, in a case of great hardship to the adverse party and substantially the same discretion on the part of the minor as if he were of age, the equity of the law will stand in the way of the latter to prevent such injury by closing the judicial ear to his appeal for assistance to avoid his obligation. But the decided cases do not furnish illustrations of such extension. However, the precedents would not limit the power of the court to extend the principles of equity where necessary to effect justice.

This court recognized the general rule in *Thormaehlen v. Kaepel*, *supra*, in these words: "We suppose, of course, that a court of equity would refuse to relieve an infant of his contract if his own fraud induced the other party to enter into it."

And further, in effect, but if the minor merely fails to impart information of his age, unasked, there being no misrepresentation of fact and no artifice employed to mislead the other party, he is not guilty of that species of fraud which will estop him from pleading his minority to avoid the contract. The court had no need at that point, to deal with the other feature essential to create the estoppel, *viz.*, that the contract must be beneficial to the minor. So one might be misled by reading the court's observation, which was not so guarded as to suggest such essential.

Enough has been said to demonstrate that a minor cannot, unless in some extreme cases of which this is not a type, even by actual fraud, estop himself from pleading his minority to avoid a contract which is not beneficial to him; as in case of his becoming a mere surety or accommodation maker of a promissory note.

The element of actual discretion on the part of the minor, characterized the instant transaction, but not that of beneficial nature to the minor, nor such extreme hardship to the other party as to warrant the doctrine of estoppel being applied. The learned trial court, quite likely, was misled by the general language in *Thormaehlen v. Kaepel*, *supra*, and by overlooking the closeness with which the doctrine that a minor may estop himself by his fraud from asserting his infancy to avoid his contract, is fenced about: (1st) By necessity for actual discretion; (2d) necessity for actual fraud; (3d) necessity for beneficial nature of the transaction to the minor. Had these essentials been appreciated fully, the ap-

plication for leave to defend against respondent's claim, notwithstanding the default, would probably have been granted.

True, a judgment rendered against a minor where he is not represented by a guardian ad litem, is not void. Such representation is not jurisdictional. Notwithstanding absence of it the judgment is proof against collateral attack. It can only be avoided by appeal for error, where the minority appears of record, or otherwise by motion or other direct proceeding in the action seasonably resorted to. This, of course, contemplates jurisdiction obtained by proper service of the summons as required by law. There was such service in this case. While the mere neglect, regardless of the cause of it, the court having jurisdiction to have a minor defendant represented by a guardian ad litem, is not jurisdictional, the rule indicated obtains by the great weight of, though not the universal authority. 1 Black on Judgments, § 193, note 34. The federal Supreme Court is in the former class. O'Hara v. McConnell, 93 U. S. 150, 23 L. Ed. 840. Some suggestions in authorities the other way are regarded as rather inconsequential.

So appellant took the proper course to avoid the effect of the judgment. He could not have reached the infirmity by appeal, since it does not appear of record. There is no question but what his motion was seasonably made as to the mere element of time. There was no element of actual fraud which stood in the way. Mere acquiescence, while under disability, was not sufficient to justify denying the motion. True, the court might, for sufficient equitable considerations in such a case, deny relief. But the policy of the law to afford a minor a day in court, properly represented by guardian ad litem, or after removal of the disability to be heard, is so general that something of an extraordinary character would be required to create an exception; something far more serious than such mere inconvenience and cost of litigation to the adverse party, as in this case.

It is not to be understood that judgments characterized by irregularity, as in this case, can always be set aside either during disability or after it has been removed. In case, notwithstanding the irregularity, the minor suffered no substantial injustice, relief is not, necessarily, grantable. That, of course, would not include a case like this where there was no enforceable liability in the first instance.

It follows that the order appealed from must be reversed, and the cause remanded with directions to grant appellant's motion.

BEICKLER v. GUENTHER.

(Supreme Court of Iowa, 1903. 121 Iowa, 419, 96 N. W. 895.)

The plaintiff, who was born in December, 1880, purchased four lots of defendant May 1, 1899, for which he agreed to pay \$650—\$42 in cash and \$7 per month thereafter—deferred payments to bear interest at the rate of 6 per cent. per annum. Six payments were made, and he then notified defendant that he would pay no more. The defendant offered to return the \$84 paid, with interest, which plaintiff refused. They then agreed about March, 1900, that for a team of horses, which was delivered to plaintiff, he would surrender the contract, which he did, and it was destroyed. On May 3, 1901, the plaintiff served written notice upon defendant that he elected to rescind the agreement by which he surrendered the contract of purchase, and tendered the return of the team. As defendant failed to signify his acceptance, and had transferred the lots to a third party, this action to recover their value was begun. Trial to jury resulted in a verdict for plaintiff, upon which judgment was entered. The defendant appeals.

LADD, J.⁸ The plaintiff was but 19 years old when he bought of defendant and became owner of the lots. Within a year, and when still a minor, he exchanged them for a team of horses. This trade he elected to rescind May 3, 1901, seven months prior to his majority, and tendered the horses back to the defendant. The law deals tenderly with a minor in permitting him to disaffirm his contracts, save for necessaries, "within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract and remaining within his control at any time after attaining his majority," except when the other party has been misled by the minor's misrepresentations as to age, or from his having engaged in business as an adult. Sections 3189, 3190, Code; *Green v. Wilding*, 59 Iowa, 679, 13 N. W. 761, 44 Am. Rep. 696. The plaintiff's occupation was that of a farm laborer at a stipulated price per year. Such employment is not peculiar to adults, and furnished no ground for the supposition that he was engaged in business as such. Aside from this, he had purchased these lots, and made payments thereon. These transactions were undoubtedly such as are ordinarily performed by persons of maturity. As such they were admissible in evidence.

But to "engage in business" is uniformly construed as signifying to follow that employment or occupation which occupied the time, attention, and labor for the purpose of a livelihood or profit. *Abel v. State*, 90 Ala. 631, 8 South. 760; *Shryock v. Latimer*, 57 Tex. 674; *Hickey v. Thompson*, 52 Ark. 234, 12 S. W. 475. See authorities

⁸ Part of the opinion is omitted.

collected in 6 Cyc. 259. The definition of "business" given by Webster is quite generally accepted: "That which engages the time, attention, or labor of any one as his principal concern or interest, whether for a longer or shorter time; constant employment; regular occupation." The kind of employment is immaterial under our statute. It may be any particular occupation in which the minor engages as an employment. The transaction of business occasionally would be in one sense "engaging in business," but the statute evidently contemplates doing so as a regular occupation or employment. See Stephenson v. Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281. It is hardly necessary to add that the evidence falls short of showing conclusively, as contended by appellant, that plaintiff had engaged in business as an adult.

The plaintiff offered in writing to return the team. This, in the absence of an acceptance, was equivalent to the actual tender of the property. But he disposed of the horses six weeks later, and it is said that, because of not keeping the tender good, he should be defeated in this action. Disaffirmance is one thing and restoration of property quite another. The minor may disaffirm before he attains the age of 21 years. Childs v. Dobbins, 55 Iowa, 205, 7 N. W. 496. He is only required by the statute to restore the money or property received by virtue of the contract "remaining within his control at any time after attaining his majority." As stated, he ceased to be the owner of the team before becoming of age, and thereafter was not in control of anything received from defendant. There was then nothing in his keeping to restore.

* * * Judgment affirmed.

IV. Same—Liability for Necessaries⁹

KILGORE v. RICH.

(Supreme Judicial Court of Maine, 1891. 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780.)

This was an action of assumpsit on an account annexed. The defendant pleaded the general issue, with a brief statement averring his infancy. The case is stated in the opinion.

PETERS, C. J. The jury found that at the request of the defendant, then an infant, the plaintiff paid for him a board-bill which he

⁹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 200-203.

had previously contracted while attending school. It was ruled at the trial that the expense of an infant's board while attending school might be regarded as necessaries. The correctness of this ruling is perhaps unquestioned. At all events, Coke's enumeration of the kinds of necessaries has always been accepted as true doctrine, which are these: "Necessary meat, drink, apparel; necessary physic, and such other necessaries, and likewise his good teaching or instruction, whereby he may profit himself afterwards."

It was also ruled at the trial that an infant, being liable to one person for such a bill, could make himself liable to another who should pay such bill for him at his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the case satisfies us that it is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle. In *Clarke v. Leslie*, 5 Esp. 28, it was held that an infant who was threatened with arrest upon a process sued out against him on a debt for necessaries would be liable to a person who, at his request, advanced money to release him. In that case there was legal pressure, but in many instances moral pressure would be great.

Swift v. Bennett, 10 Cush. (Mass.) 436, is a case where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiffs, who accepted the bill, and paid it when it became due. They were allowed to collect of the infant what the goods were reasonably worth to him, in an action for money paid on his account. So in *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746, a person who signed an infant's note given for necessities, as a surety, was allowed, after payment of the note, to recover the amount paid, not upon the note, but as money paid for the benefit of the infant. *Randall v. Sweet*, 1 Denio (N. Y.) 460, is precisely in point in the present case.

The defendant relies on the rule generally prevailing in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessities with it. "But," says Mr. Bishop, "one who pays money at his [infant's] request to a third person for

necessaries can recover it." Bish. Cont. § 914. The difference is between lending or paying. Mr. Wharton (Whart. Cont. § 72) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase "specific" necessities stands in the position of the tradesman who furnishes the necessities.

In the case at bar the plaintiff could have taken an assignment of the claim, and been entitled to recover it; and there really is no good reason to defeat his claim as it is here presented. Exceptions overruled.

MAULDIN v. SOUTHERN SHORTHAND & BUSINESS UNIVERSITY.

(Court of Appeals of Georgia, 1908. 3 Ga. App. 800, 60 S. E. 358.)

POWELL, J. Dora Mauldin, of Tunnell Hill, Ga., a 17 year old girl, an orphan, whose whole estate consisted of about \$75, came to Atlanta, and over the objection of her guardian made a contract with the defendant to take a five months' course in stenography for \$35, which at her request her guardian paid out of her moneys in his hands. Being disappointed in her expectations of being lodged and cared for by relatives while in Atlanta, she within about five days, notified the president of the business school of her inability to take the course and requested a return of her tuition; and this he refused. She brought suit. The defendant set up that her contract provided that the tuition should not be refunded except in certain providential contingencies; and that this contract was for necessities and therefore binding on her. A jury on the first trial having found in favor of the defendant, the Supreme Court granted a new trial because it did not affirmatively appear that the tuition in stenography was a necessary thing for her station in life. See *Mauldin v. Southern Shorthand University*, 126 Ga. 681, 55 S. E. 922. On the second trial there was a verdict for the plaintiff, but, on a certiorari containing substantially the general grounds, the judge of the superior court ordered a new trial; and to this the plaintiff brings error.

In our judgment the determination whether the course in shorthand would have been such a necessary thing as to charge the plaintiff with a liability therefor if she had taken it is not in the case. The right to recover from an infant for necessities does not arise out of the contract between the parties, but from a quasi contractual relation arising by operation of law. Keener on Quasi Contracts, 20. The quality of justice in the law, not the quality of efficacy in the infant's agreement, is the basis of the right of the person who has furnished the necessities to hold the infant

bound therefor. A corollary to the foregoing principle is the well-recognized rule that an infant may repudiate an executory contract for necessaries.

The case of *Jones v. Valentines' School of Telegraphy*, 122 Wis. 318, 99 N. W. 1043, is absolutely identical in every essential fact and feature with the case at bar. The plaintiff there, an infant, paid for a scholarship in a business school, but afterward, concluding not to enjoy the privilege, demanded a return of the money, which was refused, whereupon he sued for it. The court says: "It is elementary law that an infant is bound by implied contract to pay reasonably for necessaries furnished him. The limitations of the rule are plainly indicated by the statement of it. In order that the infant may be bound, all the circumstances must exist essential to raise a promise by implication of law. There must have been furnished him property or something of value, being such as to administer to his necessities. That obviously excludes the idea of an infant's being liable upon an executory contract to furnish him necessaries, as has been uniformly held. *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. No liability can be created by an infant for necessaries by express contract. His liability therefor is wholly a creation of law. 1 Parsons on Contracts (9th Ed.) 314, note 1. In view of the foregoing, we need not stop to inquire whether an infant may bind himself by implied contract to pay for educational training of the kind promised by appellant, under the rule above stated, since there is no claim that such training was bestowed upon respondent."

In *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618, the infant, being a student of Yale College, made an engagement to take lodgings from the plaintiff for a year. After holding that the infant's liability for necessaries arises by operation of law and not from any contract he may have attempted to make, and that, therefore, no executory contract is enforceable against him, the court applied the law to the case, deciding that "an infant may disaffirm his contract for the lease of a room suitable to his needs and situation in life, and is not liable for the rent of the room alleged to have accrued after such disaffirmance and after he has ceased to occupy it, although such period was within the period covered by his contract." See, also, *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690.

The case at bar has therefore been contested over the immaterial question whether tuition in shorthand would have been necessary for the girl in her station of life; for the principle of law above stated concludes the proposition that she should not be held bound on the contract in either event.

There is a suggestion in the argument that the plaintiff's right to recover back the money may be defeated on the theory that she

did not pay the defendant the money, but that her guardian paid it, making the contract his contract. This position is likewise untenable. It is a well-recognized rule that a minor may recover from whomsoever knowingly received any of his money paid out by his guardian without lawful authority. This question is discussed in the case of *Howard v. Cassels*, 105 Ga. 412, 31 S. E. 562, 70 Am. St. Rep. 44. It requires the approval of the ordinary to legalize any encroachment upon the corpus of the ward's estate by a guardian for education or maintenance. Civ. Code 1895, § 2541. No such approval is shown.

The verdict in the plaintiff's favor was demanded, and the court erred in sustaining the certiorari. Judgment reversed.¹⁰

PHILLIPS v. LLOYD et al.

(Supreme Court of Rhode Island, 1892. 18 R. I. 99, 25 Atl. 909.)

Action by Thomas Phillips & Co. against Herbert C. Lloyd and wife and the latter's mother to recover the price of materials furnished and labor done in repairing a house owned by the defendants. The mother of Mrs. Lloyd made no defense. There was a judgment of nonsuit as to defendants Lloyd and wife, and plaintiffs filed a petition for a new trial.

Mrs. Lloyd owned an undivided half interest in the house repaired, as the heir of her deceased father. The materials were furnished and work done prior to her marriage, and while she was an infant, at the request of her mother.

PER CURIAM. We do not think the court below erred in granting a nonsuit. The ground of nonsuit was that the repairs made by the plaintiffs on the dwelling house of the defendant Mrs. Lloyd were not "necessaries," within the technical sense of the word, which embraces only such things as are necessary for the support or comfort of the minor, or for his personal use, taking into account his condition and circumstances in life. *Price v. Sanders*, 60 Ind. 310, 314. Repairs on real estate are clearly not within this definition, and it has been accordingly held that an infant is not liable for such repairs, either on his own contract or on the contract of his guardian or parent, even though, as in the present case, the repairs were necessary to prevent immediate and serious injury to the dwelling house. *Tupper v. Caldwell*, 12 Metc. (Mass.) 559, 46 Am. Dec. 704. And see *West v. Gregg's Adm'r*, 1 Grant, Cas.

¹⁰ Compare *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537 (1844).

Right of guardian to use principal of ward's estate for maintenance of ward, see *Duffy v. Williams*, ante, p. 215.

(Pa.) 53; *Wallis v. Bardwell*, 126 Mass. 366; *Schouler, Dom. Rel.* § 412.

Plaintiffs' petition for new trial denied and dismissed.¹¹

V. Same—Ratification and Disaffirmance¹²

WULLER v. CHUSE GROCERY CO.

(Supreme Court of Illinois, 1909. 241 Ill. 398, 89 N. E. 796, 28 L. R. A. [N. S.] 128, 132 Am. St. Rep. 216.)

Suit by Joseph P. Wuller against the Chuse Grocery Company. From a decree of the Appellate Court, affirming a decree for plaintiff, defendant appeals.

DUNN, J.¹³ The appellee filed a bill for relief against the appellant, and the circuit court decreed the payment of \$1,500 by the appellant to the appellee and the cancellation of a certificate for 15 shares of the capital stock of appellant held by the appellee. This decree having been affirmed by the Appellate Court, an appeal is prosecuted to reverse the judgment of the latter court.

The appellee was a minor when the bill was filed and when the cause was heard. In May, 1905, the appellant corporation was organized to carry on a mercantile business, with a capital stock of \$4,500, of which the appellee subscribed and paid for 15 shares of \$100 each. He acted as secretary and treasurer of the corporation, and was a salesman and bookkeeper thereof at \$12 a week during the first year, and at \$15 a week thereafter until after he began this suit, in December, 1908. Having become dissatisfied with the conduct of the business, appellee filed a bill charging mismanagement thereof, repudiating, on account of his minority, his contract for said stock, and refusing to be bound thereby, offering to return the certificate for said stock, and praying for an accounting, the appointment of a receiver, and general relief.

The position of the appellant is that an infant, having advanced money upon a contract voidable because of his infancy, cannot rescind the contract and recover the money, and that he cannot elect to avoid the contract during his infancy. The contract of an infant is, in general, voidable by him, and gains no additional force from the fact that he is engaged in business for himself or is emancipated. The exercise of his right to disaffirm his contract may op-

¹¹ Infant's contract with an attorney for services in securing his estate or claim as a contract for necessaries, see *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721 (1902).

¹² For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d. Ed.) § 204.

¹³ Part of the opinion is omitted.

erate injuriously and unjustly against the other party; but the right exists for the protection of the infant against his own improvidence, and may be exercised entirely in his discretion. The fact that the contract has been executed is immaterial. There is no distinction between executed and executory contracts, so far as the right of disaffirmance is concerned. * * *

The consideration, or such part of it as remains in the possession or control of the minor, must be returned; but if he has lost or expended it, so that he cannot restore it, he is not obliged to make restitution. *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; *Reynolds v. McCurry*, 100 Ill. 356. Contracts concerning personal property and executory agreements may be avoided by the infant, either during or after his minority. *Childs v. Dobbins*, 55 Iowa, 205, 7 N. W. 496; *Chapin v. Shafer*, 49 N. Y. 407; *Robinson v. Weeks*, *supra* [56 Me. 102]. The shares of capital stock of a corporation are personal property, the same as promissory notes or bonds. *Cooper v. Corbin*, 105 Ill. 224. An infant's purchase of such stock is voidable, and he may, at his election, avoid it, and recover the purchase money. *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429; *White v. New Bedford Cotton Waste Corporation*, 178 Mass. 20, 59 N. E. 642. The appellee, having offered to return the stock which he had received under the contract, was entitled to the return of the purchase money he had paid.

The certificate of stock held by the appellee was merely the evidence of his rights as a stockholder. The contract by which he became a stockholder having been avoided, the decree properly provided for the cancellation of the certificate, which amounted, in effect, to the surrender of the stock by appellee and its restoration to appellant. The judgment is affirmed.

VI. Same—Time of Avoidance¹⁴

SHROYER v. PITTINGER.

(Appellate Court of Indiana, Division No. 1, 1903. 31 Ind. App. 158, 67 N. E. 475.)

Suit by Flora M. Shroyer against John A. Pittenger and others. From a judgment sustaining a demurrer to the complaint, complainant appeals.

ROBINSON, J.¹⁵ Appellant's complaint avers that in 1884 Hannah Cline owned a life estate in certain described lands, with remainder

¹⁴ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 205-207.

¹⁵ Part of the opinion is omitted.

in fee in appellant and two others. Hannah Cline died in 1892. In 1894 and 1895 appellant, by purchase, became the owner of the whole. In 1884 appellant was a minor 20 years of age, a married woman, residing with her husband in the territory of Dakota, and in January of that year she and her husband executed a deed to appellee, conveying to him the undivided one-third in fee of the land, which deed was duly recorded. The deed recites a consideration of \$400, but it is averred she received no consideration whatever, that appellee knew of her minority, and that she received no consideration for the conveyance. In 1885 appellant and her children were abandoned by the husband, and she returned to her mother, Hannah Cline, then residing on the land, and immediately notified appellee that she was a minor when she executed the deed, and that she received no consideration therefor, and that she would not be bound by the same, but repudiated and disaffirmed the deed, and repeatedly thereafter so stated and asserted to him; that thereupon appellee acknowledged that he knew she was a minor when she made the deed, and that she was not bound thereby, and that she had the right to avoid the deed, but that appellee had paid the husband \$400 therefor, and that he should be repaid that sum; that appellee at the time owned land adjoining, upon which he operated a stone quarry near the dividing line, the strata of stone extending continuously from one tract to the other, and which was of great value for quarrying for market; that thereupon appellant agreed that appellee might operate the quarry on the lands in question until he had been repaid the \$400, and that he would not have the deed recorded, but that the same should be canceled and destroyed; that, pursuant to this agreement, appellee extended the quarry onto not exceeding one-half acre of the lands in question, and removed stone therefrom of the value of \$3,000; that appellee has never had possession of the rest of the land, but the same was in the possession of Hannah Cline until her death, and since in the possession of appellant; that appellee has wrongfully placed the deed on record, and claims an interest in the land, which is without right, and is a cloud upon appellant's title; that appellee continues, without right, to quarry stone from the land, and refuses to account to appellant for the value thereof; that on an accounting there is due appellant \$2,000; that appellant offers to abide by any order the court may make in the premises. Prayer for an accounting, an injunction to enjoin the further operation of the quarry, judgment for damages, and that the deed be declared void and appellant's title quieted. A demurrer to the complaint was sustained, and on that ruling rests the assignment of error.

The husband did not join in the conveyance, but it does not appear that he was of full age. Moreover, it is averred that appellant received no consideration for the sale, so that it was not necessary

to restore the consideration before disaffirming the sale, as provided in section 3364, Burns' Rev. St. 1901. See *Miles v. Lingerman*, 24 Ind. 385.

The courts of this state, and very generally, construe infants' contracts as voidable, and not void, for the reason that it is for the sole advantage of the infant that the privilege of avoiding a contract is conferred, and such a construction more often promotes public justice, and operates more advantageously to the infant himself. What confusion exists on the subject has arisen from a careless use of the words "void" and "voidable." An infant's contract might be void for reasons that would render a contract of an adult void. But the better reasoning supports the rule that no contract of an infant is void because of his nonage, but all such contracts are voidable only, except contracts for necessaries, and such contracts as he may make by statutory authority, which are binding. See *Fetrow v. Wiseman*, 40 Ind. 148; *Law v. Long*, 41 Ind. 586; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538; *Losey v. Bond*, 94 Ind. 67; *Welch v. Bunce*, 83 Ind. 382.

An infant's conveyance of lands, being not void, but voidable, cannot be avoided or disaffirmed because of nonage, merely, until the infant reaches majority; and no right of action because of infancy at the time of the conveyance, as to lands conveyed, exists until the conveyance has been avoided or disaffirmed. While a conveyance of the same land to some one else after majority, and in disregard of the former deed, is a disaffirmance of the deed made during infancy, yet the doctrine that the act of disaffirmance must be by instrument of equal solemnity with the instrument sought to be avoided no longer obtains. Nor do we understand it to be the rule in this state, as claimed by counsel, that the act of disaffirmance must necessarily be in writing, and served upon the grantee. Such an act would be a disaffirmance, but not exclusively so. Disaffirmance does not consist wholly of some act done, but is a matter both of act and intention, and is accomplished where the party, after full age, and intending to disaffirm, does some act of positive and distinct dissent, inconsistent with the continued validity of the contract made during infancy.

The rule is thus stated in *Long v. Williams*, 74 Ind. 115: "There are in this state several well-recognized modes of disaffirming a voidable deed. The disaffirmance may be by entry upon the land, by a written notice of disaffirmance, by a subsequent conveyance, or by any other equally emphatic act declaratory of an intention to disaffirm." See *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 South. 417, 12 L. R. A. 136; *Singer, etc., Co. v. Lamb*, 81 Mo. 221; *Illinois Land Co. v. Beem*, 2 Ill. App. 390; *Allen v. Poole*, 54 Miss. 323; *Dixon v. Merritt*, 21 Minn. 196; *Cogley v. Cushman*,

16 Minn. 397 (Gil. 354); *State v. Plaisted*, 43 N. H. 413; *Bagley v. Fletcher*, 44 Ark. 153; *Drake's Lessee v. Ramsay*, 5 Ohio, 251; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Buchanan v. Hubbard*, 119 Ind. 193, 21 N. E. 538; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569, note.

The time within which the deed must be disaffirmed after the infant becomes of full age depends upon the particular circumstances of each case. The object sought to be accomplished in requiring a disaffirmance is to avoid litigation, and to enable the parties to correct the evils without suit and costs. *McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897; *Lange v. Dammier*, 119 Ind. 567, 21 N. E. 749. All the authorities seem to agree that the contract must be disaffirmed within a reasonable time. "What constitutes a reasonable time," said the court in *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263, "within which a person who has executed a deed during infancy shall disaffirm it, depends upon the particular circumstances of each case. The right must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed, and it may be, under the circumstances of the particular case, that it should be exercised within a shorter period. It is the disaffirmance which avoids the deed of the infant, and not the bringing of the action to recover the land conveyed."

In the case at bar the deed was executed in January, 1884, while appellant was living in the territory of Dakota, and upon her return, in 1885, and frequently thereafter, she repudiated the deed. She lived with her mother upon the land until the mother's death, and since then she has had possession of the land in question, except about one-half acre. The complaint does not plead any acts or conduct on the part of appellant after the disaffirmance which show an affirmance of the deed. If there was anything said or done by appellant after the alleged disaffirmance that would show she afterwards confirmed the deed, it would properly be brought forward by answer. The facts pleaded show that the disaffirmance was within a reasonable time after the execution of the deed. See *Scranton v. Stewart*, 52 Ind. 68; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263, and cases cited. * * * Judgment reversed.¹⁶

¹⁶ Right to avoid contract during infancy, see, also, *Gonackey v. General Accident Fire & Life Assur. Corp.*, post, p. 280.

GOODNOW v. EMPIRE LUMBER CO.

(Supreme Court of Minnesota, 1884. 31 Minn. 468, 18 N. W. 283, 47 Ara. Rep. 798.)

GILFILLAN, C. J. November 27, 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21, 1842. She died December 16, 1867, and her husband died November 10, 1874. Plaintiffs are their children, Mary, born March 31, 1859, and Eugenia, January 29, 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber company of their intent to disaffirm the conveyance, March 22, 1883.

Treating this as a sufficient act of disaffirmance in case they then had the right to disaffirm, and it is not material whether it was or not, for the bringing of the action, which was sufficient, immediately followed, there elapsed between the execution of the deed and its disaffirmance twenty-five years and four months. The disability of infancy on the part of the infant grantor ceased April 21, 1863, and as the real estate was owned by her at the time of her marriage, her disability from coverture, so far as affected her right to reclaim, hold and control the property ceased August 1, 1866, when the General Statutes (1866) went into effect; so that for four years and eight months before she died she was free of the disability of infancy, and for one year four and a half months, she was practically free of the disability of coverture. During the latter period, at least, she was capable in law to disaffirm the deed, if she had the right to do so, and if she was required to exercise the right within a reasonable time after her disability ceased, the time was running for that period. The youngest of the plaintiffs became of age January 29, 1881, so that even if the period of minority of plaintiffs were to be excluded (and we doubt if it should be) there is to be added at least two years and two months to the time which had elapsed when the grantor died, making the time three years and over six months.

The main question in the case is, must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred. Of the decided cases the majority are to the effect that he need not (where there are no circumstances other than lapse of time and silence), and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations. The following are the principal cases so decided: *Vaughan v. Parr*, 20 Ark. 600;

Boody v. McKenney, 23 Me. 517; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Prout v. Wiley, 28 Mich. 164; Youse v. Norcum, 12 Mo. 550, 51 Am. Dec. 175; Norcum v. Gaty, 19 Mo. 69; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Baker v. Kennett, 54 Mo. 82; Huth v. Car. Mar. Ry. & Dock Co., 56 Mo. 206; Hale v. Gerrish, 8 N. H. 374; Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Voorhies v. Voorhies, 24 Barb. (N. Y.) 150; McMurray v. McMurray, 66 N. Y. 175; Lessee of Drake v. Ramsay, 5 Ohio, 252; Cresinger v. Lessee of Welch, 15 Ohio, 156, 45 Am. Dec. 565; Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800; Ordinary v. Wherry, 1 Bailey (S. C.) 28.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following are the principal ones: Holmes v. Blogg, 8 Taunt. 35; Dub. & W. Ry. Co. v. Black, 8 Exch. 180; Thomasson v. Boyd, 13 Ala. 419; Delano v. Blake, 11 Wend. 85, 25 Am. Dec. 617; Bostwick v. Atkins, 3 N. Y. 53; Chapin v. Shafer, 49 N. Y. 407; Jones v. Butler, 30 Barb. (N. Y.) 641; Kline v. Beebe, 6 Conn. 494; Wallace's Lessee v. Lewis, 4 Har. (Del.) 80; Hastings v. Dollarhide, 24 Cal. 195; Scott v. Buchannan, 11 Humph. (Tenn.) 468; Hartman v. Kendall, 4 Ind. 403; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Richardson v. Boright, 9 Vt. 368; Harris v. Cannon, 6 Ga. 382; Cole v. Pennoyer, 14 Ill. 158; Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224; Robinson v. Weeks, 56 Me. 102; Little v. Duncan, 9 Rich. (S. C.) 55, 64 Am. Dec. 760.

The rule holding certain contracts of an infant voidable (among them his conveyances of real estate) and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the court in Wallace's Lessees v. Lewis, "a dangerous weapon of offense, and not a defense." For we cannot assent to the reason given in Boody v. McKenney (the only reason given by any of the cases for the rule that long acquiescence is no proof of ratification) "that by his silent acquiescence he occasions no injury to other persons and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily."

The existence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it, and the longer it may continue the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without delay whether he will exercise it. The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others—with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That 10, 15, or 20 years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule which is solely protection to the infant. Reason, justice to others, public policy (which is not subserved by cherishing defective titles), and convenience require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. *Cochran v. Toher*, 14 Minn. 385 (Gil. 293); *Derosia v. W. & St. P. R. Co.*, 18 Minn. 133 (Gil. 119).

Three years and a half, the delay in this case (excluding the period of plaintiff's minority, after the time within which to act had commenced to run), was *prima facie* more than a reasonable time, and *prima facie* the conveyance was ratified. Order reversed.

VII. Same—Who may Avoid Contract¹⁷

HARVEY v. BRIGGS.

(Supreme Court of Mississippi, 1890. 68 Miss. 60, 8 South. 274, 10 L. R. A. 62.)

Action of ejectment by J. J. Briggs against J. B. Harvey. R. W. Briggs, the father of the plaintiff, was in possession of the land, claiming ownership, when he died. After the death of R. W. Briggs, his widow married one Courtney. On November 24, 1876, Courtney and his wife and Ella and Dora Briggs, minors, united in executing a deed of the lands to F. A. Harvey, father of the defendant. J. J. Briggs was at that time a minor. Ella and Dora Briggs died before attaining their majority. There was judgment for plaintiff, and defendant appeals.

WOODS, C. J.¹⁸ * * * The right of a minor to disaffirm his contract, and the terms upon which such disaffirmance may be had, are much discussed by counsel. * * * In discussing the effect of the conveyance of the minors, Dora and Ella Briggs, and the attempted disaffirmance, by the plaintiff, of their contract (they having died during their minority), it is asserted that the right to disaffirm is one personal to the minor, reliance being put upon a remark to that effect, on a petition for reargument, in the case of *Alsworth v. Cordtz*, 31 Miss. 32. The remark was perfectly correct, as applied to the facts of that case, in which a stranger to the minor, one not the heir or legal representative, attempted to assert this privilege of the minor for his, the stranger's, own benefit. Very properly the court denied the stranger the privilege. But it is not to be supposed that, by this remark of the court that infancy is a personal privilege and not to be set up by the stranger attempting to plead it in that case, it was never designed to overturn the universally recognized right of the legal representative or heir of the infant to assert this privilege of pleading infancy. The counsel have taken the remark with too much literalness, and the position that no one but the infant can set up the privilege of minority to defeat his adversary cannot be maintained. The legal representative or heir of the infant is entitled to plead minority in avoidance of the infant's contracts, if the plea is made in good time. Here, in this case, Dora and Ella Briggs were minors when they executed the deed to Harvey, and they both died during infancy. This sole heir, on arriving at his majority, promptly dis-

¹⁷ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 208, 209.

¹⁸ Part of the opinion is omitted and the statement of facts is rewritten.

affirms their contract, and seeks to avoid it, and this he clearly has the right to do. It is useless to dwell on this point, or to refer to authority.

In this connection, too, it is further contended for appellant that the plaintiff, if entitled to disaffirm the contract of Dora and Ella, his minor sisters, at all, can only do so on repayment of the consideration received by them from Harvey, their vendee. It is true that Chief Justice Sharkey, in *Hill v. Anderson*, 5 Smedes & M. 216, asserted that "an infant vendor may recover back his property, real or personal, but in such cases he must refund what he has received." And this seems to have been followed and adopted by this court in *Ferguson v. Bobo*, 54 Miss. 121. But the point was not really before the court in this last-named case, and the dictum of the court, which was in agreement with Chief Justice Sharkey's opinion, and with many other authorities venerable with age, was distinctly recalled and repudiated, by the same judge who gave it utterance, in the later case of *Brantley v. Wolf*, 60 Miss. 420. That the minor must refund, if he elects to disaffirm, is true, provided he has in his possession the consideration received by him when he elects to disaffirm, as was forcibly said in the last-named case: "If he has lost or squandered the consideration during minority, this is nothing more than the law expects of him, and he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate. Such a rule would practically strike down the shield which the law, by reason of his inexperience and youth, throws around him." * * * Affirmed.¹⁹

VIII. Same—What Constitutes Ratification²⁰

HATCH v. HATCH.

(Supreme Court of Vermont, 1888. 60 Vt. 160, 13 Atl. 791.)

Appeal from the allowance of commissioners of certain claims against the estate of Lura Hatch, deceased. Petitioner's claim was based on the following facts: In 1873, when Lura Hatch was 16 years old, she wished to go to a higher school than the ordinary district school and asked her mother to be allowed to do so. As

¹⁹ Accord: *Linville v. Greer*, 165 Mo. 380, 65 S. W. 579 (1901).

Time within which heir must disaffirm, see *Harris v. Ross*, 86 Mo. 89, 59 Am. Rep. 411 (1885).

²⁰ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 210, 211.

her mother could not afford to pay the increased expenses, Lura expressed her willingness that the expenses should be eventually paid out of her share of her father's estate. Her mother thereupon agreed to advance the money, with the understanding that Lura should repay the amount out of her own property. After Lura came of age, and while still attending school, she reiterated her willingness to pay the expenses of her schooling, referred with approval to her promise made during her minority, and expressed the wish that the arrangement should continue. The total amount advanced by the mother, with interest to September 1, 1886, is \$720.20.

VEAZZY, J.²¹ * * * The plaintiff was the mother of Lura E. Hatch, deceased, and claims to recover the items of her account in controversy on the ground of a contract between the mother and daughter while the latter was a minor of 16 years of age, and a ratification of the same after she became of full age. The first item, including interest to September 1, 1886, was \$720.20, for money which the plaintiff paid for school expenses of Lura while attending academies. We think the report shows a distinct agreement on the part of Lura to repay her mother for these expenses. Upon the facts reported the agreement was a natural one to be made, and was in its nature beneficial to the minor. The mother clearly could not afford to give her daughter the higher education which she desired. The latter had the means to be devoted to such use by the devise to her by her father, but not in ready money. The finding of the auditor is incapable of a fair construction other than of an agreement as above stated when taken in connection with the circumstances existing when the arrangement was made.

The defendant relies mainly upon the claim that this contract was not ratified after Lura arrived at her majority. The finding of the auditor is this: "After Lura became of age, and while still attending the seminary at Montpelier, she reiterated to her mother her desire to go to school there, and her willingness to pay the expenses incident thereto from her own share, and referred approvingly to her former promise to that effect during her minority. She told her mother she wished this arrangement to continue as it had been before she came of age." There is no question but that the contract by which a debt is incurred by an infant may be ratified by an express promise to pay the debt, made by the infant, when he becomes of age, deliberately and with knowledge that he is not liable by law. To this extent the cases agree. Beyond this they are not entirely harmonious, at least in the enunciation of what is required to constitute ratification. As illustrations, see *Smith v. Mayo*, 9 Mass. 62, 6 Am. Dec. 28, and *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229. There are many cases which hold

²¹ Part of the opinion is omitted and the statement of facts is rewritten.

that, although an express ratification is necessary, yet it is not required to be in the form of an express new promise. *Tibbets v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307, and *Harris v. Wall*, 1 Exch. 122, are examples. Acts and declarations of one, after attaining majority, in favor of his contract, may be of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise. Mere acknowledgment of the contract, or partial payment, will not alone be sufficient. There must either be an express promise to pay, or such a direct confirmation as expressly ratifies the contract, although it be not in the language of a formal promise. *Wilcox v. Roath*, 12 Conn. 551; *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; *Whitney v. Dutch*, *supra*.

The cases in Vermont have not recognized the necessity of an express promise in terms in order to constitute ratification of an obligation incurred during infancy. Where the declarations or acts of the individual after becoming of age fairly and justly lead to the inference that he intended to and did recognize and adopt as binding an agreement executory on his part made during infancy, and intended to pay the debt then incurred, we think it is sufficient to constitute ratification, provided the declarations were freely and understandingly made, or the acts in like manner performed, and with knowledge that he was not legally liable. This proposition is clearly within the scope of decision in a long line of approved authorities cited in *Tyler, Inf.* (2d Ed.) c. 6, and 1 Amer. Lead. Cas. 250. The Vermont cases plainly warrant us in holding that the above conditions are sufficient. In *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589, *Prentiss, C. J.*, says: "Though it is laid down that a bare acknowledgment or recognition of the contract of an infant, after he comes of age, without an express promise, will not, where the contract is for the payment of money, or the performance of some personal duty, and remains executory, amount to a ratification, yet in general an express act done under a contract of his infancy, implying a confirmation of it, has been held to be sufficient." See, also, *Forsyth v. Hastings*, 27 Vt. 646.

Regarding these conditions as not only sufficient, but required, we think they are all covered by the finding of the auditor. Taking that which she said to her mother after arriving at full age, and while still at the seminary, in connection with the unmistakable understanding between the parties during the infancy, and all the circumstances, the conclusion seems to us irresistible that there was a mutual understanding that Lura would not only repay her mother for the future advances, but would pay the past advances as she had at first promised. She then called the first arrangement "her former promise," and told her mother she wished it to continue as it had been before she became of age. When the minds of con-

tracting parties meet, and they both understand that by what is said it is intended that it should be taken as an assumption of an obligation and a promise to pay, it is the equivalent of a promise in terms. There is no question but Lura spoke deliberately and without duress in any form, and we think it is plain that she spoke understandingly as to her legal liability. It has been held that, in the absence of any proof to the contrary, it is to be presumed that at the time of making the new promise the person, lately an infant, was aware of his rights. *Taft v. Sergeant*, 18 Barb. 321. This would seem to be the natural presumption.

But, however this may be, the language of Lura, under the circumstances in which it was spoken, imports such knowledge. It is difficult to see what should lead Lura to renew her promise as to the payments in her behalf during infancy except upon the theory of knowledge that such renewal was necessary to create legal liability. She was then at the seminary, her contemplated education incomplete, and no change from the previous condition except that she had attained her majority. She then brings the matter up, reiterates her desire to go on, and in effect renews her former promise so as to make the renewal applicable as to past as well as future advances. She had the education which about two years in the academy would bring after having passed through the common school.

We come to the conclusion of her knowledge of the legal situation without hesitation. * * * The judgment is reversed, and judgment is rendered for the plaintiff for the item of \$720.20 with interest.

DAMRON v. RATLIFF.

(Court of Appeals of Kentucky, 1906. 123 Ky. 758, 97 S. W. 401.)

Action by William J. Damron against W. O. B. Ratliff. From a judgment for defendant, plaintiff appeals.

LASSING, J.²² In May, 1887, Walter Damron and his father, James Damron, conveyed by deed duly executed to W. O. B. Ratliff a tract of land in Pike county, Ky. A few months after this conveyance, appellee Ratliff moved upon and took actual, exclusive possession of the entire tract of land, and has remained and continued in the actual possession thereof ever since. At the date of this conveyance, Walter Damron was under 21 years of age. Appellee agreed to, and did, pay him \$350 for said land, \$250 of which was paid before the said Walter Damron became of age, and \$100 was paid on April 26, 1892, and after he became of age. On April 30, 1892, the said Walter Damron conveyed this same tract of land

²² Part of the opinion is omitted.

to one A. J. Auxier, by deed which was duly acknowledged, and Auxier, on the same day, conveyed the same land to W. J. Damron, appellant herein. * * *

Two questions are presented for determination: First, did the acceptance of \$100, the remainder of the purchase price, by Walter Damron after reaching his majority amount to a ratification of the sale he had made while an infant? and, second, was the sale and conveyance from Auxier to appellant champertous?

We will consider the question of ratification first. If the contract of sale made by Walter Damron to appellee Ratliff was a voidable contract, then it was such a one as he could ratify after arriving at the age of 21 years. The weight of authority is that the contract in question was a voidable contract. "Much the greater portion of all of the acts and contracts of an infant are voidable only, for it is the policy of the law not to encumber the free action of the infant by disabilities, but allow him the right to suspend ultimate decision upon a doubtful question of benefit until he shall be of full age, and placed on a footing equal to the other contracting party." Story on Contracts, art. 58.

A voidable act is binding upon the adult contracting party until disaffirmed by the infant, and hence is capable of being affirmed when the infant attains his majority. Chief Justice Parker thus states the rule in *Whitney v. Dutch*, 14 Mass. 462, 7 Am. Dec. 229: "Whenever the act done may be for the benefit of the infant it shall not be considered void, but that he shall have his election when he comes of age to affirm or avoid it." The act of the infant may be ratified in three ways: First, by the failure on his part to disaffirm the contract within a reasonable time after reaching full age; second, by accepting the benefits of the contract made during infancy after arriving at full age, and, third, by retaining property received under a contract made during infancy, and using and enjoying same after coming of full age.

In this case, it is necessary to consider only the second ground upon which a contract may be ratified, to wit, the acceptance of a consideration for the contract on reaching his majority. The rule is thus laid down in the note to the case of *Craig v. Van Bebber*, 18 Am. St. Rep. 715: "If a person after attaining his majority accepts the consideration of a contract made by him while an infant, such an act very plainly amounts to a ratification of the contract; as, where an infant lessor accepts rent after reaching full age, or receives interest under his agreement, or accepts the purchase price of property sold by him. *Ferguson v. Bell's Adm'r*, 17 Mo. 347, and other cases therein referred to." This case and the doctrine laid down in the cases cited herein are directly in point, and are conclusive of the question under consideration.

Walter Damron reached his majority on or before the 26th day

of April, 1892, and on said date he accepted the remainder of the purchase price for the land which he had sold to appellee Ratliff. By this act he ratified the sale which he had made to Ratliff during his infancy, and the act of ratification related back to the date of the contract of sale and made that contract as perfect and complete as though he had been 21 years of age when it was made. This being true, the sale and conveyance which he made, or attempted to make, to Auxier four days later was absolutely void, as he had perfected the title to said land in appellee by the acceptance of the remainder of the purchase money for same from him.

The ratification of the contract of sale by Walter Damron to appellee after reaching his majority having perfected the title of appellee to the land in question, it is unnecessary to pass upon the second question raised upon this appeal. The judgment is affirmed.

IX. Same—What Constitutes Disaffirmance²³

HAYNES v. BENNETT.

(Supreme Court of Michigan, 1884. 53 Mich. 15, 18 N. W. 539.)

SHERWOOD, J.²⁴ Ejectment to recover 40 acres of land. * * * The defendant claims to derive title to the land under and by virtue of a deed obtained from Mary McCartney while an infant under the age of 16 years. * * * The plaintiff had judgment for the premises, and the defendant was allowed \$25 for his improvements.

The case now comes before us on error upon the findings of the circuit judge. From such findings it appears that the land in question was entered by Richard M. Daniels, and by regular transfer, shown by proper conveyances, the title was conveyed to (the minor) Mary McCartney, March 9, 1876. She then conveyed to Chapman; Chapman to Bull; Bull to Corey; and Corey to Bennett, the defendant. Mary McCartney became of age in November, 1881, and on the seventeenth day of May following she conveyed the premises to the plaintiff's grantor. It further appears that the land has been continuously occupied by the defendant and his grantors since 1854; that Miss McCartney at, and for several years immediately prior to, the defendant's purchase, resided out of the

²³ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) § 212.

²⁴ Part of the opinion is omitted.

county and had not seen the lands for three or four years; that no possession of the premises was ever demanded or notice to quit given before suit brought; that Mrs. Taft (Miss McCartney's name after marriage) never gave any notice or did anything to revoke her first deed, except the making of the conveyance to plaintiff's grantors; that the defendant has peaceably occupied and possessed the premises in question as a part of his farm from the time of his purchase until the commencement of this suit; and that the improvements he has made increased the value of the land \$25.

Upon these facts the circuit judge held as matter of law that the giving and recording of the deed to plaintiff's grantors after Mrs. Taft became of age, at the time she did it, was a good revocation of her first deed, and without other or further act or acts entitled the plaintiff to bring this suit against her first grantee in possession, and that defendant could recover the \$25 for improvements. We think the finding was correct, and we see no error in the record as presented. The deed of an infant is voidable, and must be avoided before the action will lie; but when properly avoided no other thing is necessary to be done before bringing suit. The necessity for the infant to make entry before giving the deed of avoidance, or before bringing suit, does not exist in this state. Title by descent, and our mode of transferring title by deed, are regulated by statute. The old common-law doctrine of feoffment with livery of seizin does not constitute any part of our law of conveyancing. Our registry laws supply their place, and furnish the notoriety of transfer intended to be given by that ancient mode of passing title; and the making and recording of the second deed in this case was entirely sufficient. 2 How. St. c. 216, §§ 5652, 5657; 1 Pars. Cont. (3d Ed.) pp. 373, 374; *Eagle Fire Co. v. Lent*, 6 Paige (N. Y.) 635; *Cresinger v. Welch*, 15 Ohio, 192, 45 Am. Dec. 565; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Hoyle v. Stowe*, 19 N. C. 320; *Lessee of Tucker v. Moreland*, 10 Pet. 58, 9. L. Ed. 345; *Bing. Inf.* 60; *Dixon v. Merritt*, 21 Minn. 196; *McGan v. Marshall*, 7 Humph. (Tenn.) 121; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Lessee of Drake v. Ramsay*, 5 Ohio, 252; *Hastings v. Dollarhide*, 24 Cal. 195; *Pitcher v. Laycock*, 7 Ind. 398; *Laws* 1881, p. 385; *Crane v. Reeder*, 21 Mich. 82, 4 Am. Rep. 430; *Prout v. Wiley*, 28 Mich. 164. * * * Judgment affirmed.²⁵

²⁵ See, also, *Shroyer v. Pittenger*, ante, p. 263.

X. Same—Return of Consideration²⁶

CRAIG v. VAN BEBBER.

(Supreme Court of Missouri, 1890. 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

BLACK, J.²⁷ This is an action of ejectment for 100 acres of land, commenced by Ella Craig and her husband, Daniel Craig, against Van Bebber, Tully, and Sprankle. The plaintiff Ella Craig inherited the land from her father; and she and her husband conveyed the same to Henderson Tabor by a deed dated the 28th July, 1884, for the consideration of \$1,463. Of this amount, Tabor paid in cash \$350, and executed to them his four notes, due in one, two, three, and four years, for the balance of the purchase price, and secured the same by a deed of trust on the land. The sale was made through an agent, and the agreement was that the plaintiffs should have the first deed of trust. It seems however, that Tabor gave a deed of trust on the land to secure a debt of \$800, which was by some manipulation made prior in point of time to the one given the plaintiffs for purchase money. This prior deed of trust was made by Tabor to one J. B. Watkins as trustee. By virtue of authority set out in the deed of trust, Watkins constituted W. J. Patterson his attorney in fact to act for and in his behalf. Patterson, as such attorney in fact for Watkins, advertised and sold the property to defendant Sprankle on the 8th October, 1886. The other defendants are the tenants of Sprankle.

The plaintiff Ella Craig was a minor, 16 years of age, when she and her husband executed the deed to Henderson Tabor. The notes executed by Tabor are now in the possession of plaintiffs, and have not been paid. Mrs. Craig became 18 years of age on the 18th day of March, 1886; and this suit was commenced in November, 1886, to disaffirm the deed made by her while a minor. Plaintiffs did not offer to refund the \$350. The evidence offered to show a ratification is, in substance, this: As soon as the plaintiffs learned that their deed of trust was a second lien instead of the first, they demanded a first deed of trust, according to their contract; but their demand was refused. They also demanded payment of the notes, which was refused. They executed a new deed after the wife became of age, and offered to deliver it, provided the notes were paid or secured by a first deed of trust, but upon no other condition. * * *

²⁶ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 214, 215.

²⁷ Part of the opinion is omitted.

The defendants asked, but the court refused to give, the following declaration of law: "The infancy of Ella Craig does not entitle plaintiff to recover, as no offer or tender was made by them to return to Sprankle funds or consideration received by Ella Craig, arising from the sale and conveyance of the land by her to Tabor." The theory of this instruction is that plaintiffs were bound to make a tender to Sprankle for the \$350 paid them by Henderson Tabor, the grantee in the deed which the plaintiffs seek to avoid. Where the contract has been executed by the infant, and has been in whole or in part executed by the adult, and the infant, upon coming of age, repudiates the transaction, he must return the property or consideration received. This general rule has often been stated without any qualification whatever. But the weight of authority is that the rule can only apply where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered the consideration or property during infancy, then he can repudiate the contract without making a tender. *Tyler, Inf.* (2d Ed.) § 37; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Reynolds v. McCurry*, 100 Ill. 356; *Brandon v. Brown*, 106 Ill. 519; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Walsh v. Young*, 110 Mass. 396.

The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity; and, if he were required to restore an equivalent where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed. *Kerr v. Bell*, 44 Mo. 120; *Highley v. Barron*, 49 Mo. 103; and *Baker v. Kennett*, 54 Mo. 82, are cited as affirming the general rule before stated without any exception; and some expressions used would seem to lead to that result. But a careful consideration of the facts of these cases will show that there was no occasion for considering the exception. The remarks there made must be read and understood in the light of the facts before the court. We entertain no doubt but the rule, with the qualification before stated, is the correct one. The instruction is therefore faulty, and especially so in view of the evidence that Mrs. Craig did not have any money or property save the land in question. The notes are in the hands of the plaintiffs, and the fact of disaffirmance will discharge the maker; for the law is well settled that the infant, having repudiated his or her deed, cannot recover the unpaid purchase price.

The evidence fails to make out a *prima facie* case of ratification. There is no evidence that Mrs. Craig, or even her husband, received any part of the purchase price after she attained her majority. She and her husband did offer to execute and deliver a confirmatory deed upon being paid the balance of the purchase

price, namely, \$1,113, or upon receiving a first deed of trust upon the land securing that amount; but it did not suit the purposes of Tabor, or any other of the interested parties, to comply with that condition. A mere acknowledgment that a debt exists, or that a contract has been made, will not constitute a ratification. *Baker v. Kennett*, *supra*. There must be an intention to affirm the deed. A deed of confirmation is not necessary, but the act relied upon must be of such a nature as to show a clear intention to confirm the deed. An offer to make a deed of ratification upon the condition that the unpaid purchase price is paid or secured is no evidence of a confirmation. It rather shows a disposition to disaffirm, should the proposed condition not be performed. * * *

Judgment affirmed.

GONACKY v. GENERAL ACCIDENT, FIRE & LIFE AS-SUR. CORP.

(Court of Appeals of Georgia, 1909. 6 Ga. App. 381, 65 S. E. 53.)

Elizabeth Bell Gonackey, a minor, by next friend, brought suit for \$300 on a policy of insurance issued by the defendant on the life of her brother in which she was named as sole beneficiary. Within 10 days immediately following the death of the insured, petitioner was paid \$50 by one Robinson, an agent of the company, when she delivered the policy to him and signed a receipt of some kind for the money paid to her. She delivered the policy to the company for the reason that she thought she was entitled to receive no more than \$50 thereunder; but, subsequently ascertaining that she was entitled to the full amount of the policy, she made a demand on the company for it through her next friend through whom she now sues, which demand was refused, and the policy contract is in the possession of the company. It is also alleged that the petitioner is unable to pay the \$50 which was paid to her on the policy because she has spent the whole amount, and is unable to make any restitution.

The company filed a general demurrer, making the contentions (1) that the contract made by the infant beneficiary with the insurance company in settlement of the policy was fully executed and cannot be avoided during infancy; (2) that the infant must make restitution of the \$50 to the company before disaffirming the contract. The court sustained the general demurrer and dismissed the petition; and error is assigned on this judgment.

HILL, C. J.²⁸ All contracts relating to personality made by an

²⁸ Part of the opinion is omitted and the statement of facts is rewritten.

infant can be avoided during minority as well as after the infant has attained majority, and this right applies to executed as well as to executory contracts. *Harris v. Cannon*, 6 Ga. 387; *Smith v. Smith*, 36 Ga. 189, 91 Am. Dec. 761; *Nathans v. Arkwright*, 66 Ga. 186; *Clark on Contracts* (2d Ed.) 164; 22 Cyc. 611. These authorities announce the rule that while a deed to land executed by an infant cannot be disaffirmed during his minority, although he may enter on the land and take the profits until the time arrives when he has the legal capacity to affirm or disaffirm, this rule does not apply to a contract relating to personality, and that such a contract may be avoided by him while he is still an infant. *Clark* in his work on contracts, *supra*, states that the rule is general and almost universal that an infant may avoid any contract relating to his personal property before he becomes of age, and cites many authorities in support of this dictum. Probably the statement of the rule that an infant cannot disaffirm his deed to land is subject to the exception that if, in order to protect the infant in his rights, it should be necessary that the deed be avoided before his majority, it might be done by him suing by his guardian or next friend.

Following the weight of authority on this subject, it has been held by the Supreme Court that, while an infant should not be allowed to avoid his contract without making restitution of any money or property which he has received under the contract, yet he is not required to make restitution as a condition precedent to a disaffirmance, unless, at the time of the disaffirmance, he has the fruits of the contract in his possession. If he cannot restore, he is not required to do so. This has been expressly ruled by this court in the case of *Hughes v. Murphy*, 5 Ga. App. 328, 63 S. E. 231, and by the Supreme Court in *Shuford v. Alexander*, 74 Ga. 295, and *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 788, 49 S. E. 788. See, also, *Clark on Contracts*, p. 171; 22 Cyc. pp. 614, 616; 16 Amer. & Eng. Enc. of Law (2d Ed.) 293, and an elaborate note on the subject to the case of *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665.

The cases of *Strain v. Wright*, 7 Ga. 568, *Harris v. Collins*, 75 Ga. 97, and *Thomason v. Phillips*, 73 Ga. 140, relied upon by the defendant in error on their facts, are not in conflict with the decisions of the Supreme Court above cited. In each of those cases it appeared that the minor was at the time of the disaffirmance of his contract in possession of the fruits of the contract, and could make restitution. Even if the plaintiff in this case was required to restore the money which had been paid to her when she surrendered the policy to the company, there was still due her under the policy according to the allegations of the petition, the sum of \$250. But for the reasons stated we think she is entitled to recover the full amount of the policy without any deduction on account of the

\$50 which had been improperly and imprudently paid to her by the company, and which she had perhaps improvidently spent or squandered. * * * Judgment reversed.²⁹

XI. Liability of Infants for Torts³⁰

YOUNG v. MUHLING.

(Supreme Court of New York, Appellate Division, Second Department, 1900. 48 App. Div. 617, 63 N. Y. Supp. 181.)

Action by Charles Young against Eugene Muhling to recover damages for the abuse of plaintiff's team, which had been hired to defendant. From a judgment for plaintiff, and an order denying a new trial, defendant appeals.

WILLARD BARTLETT, J. At the time of the transactions involved in this suit the defendant was a minor. About the middle of June, 1898, he went to the plaintiff's livery stable, at Spring Valley, in Rockland county, and ordered a team with which to go to Haverstraw on the 3d of July following. He told the plaintiff's agent in charge of the stable that he wanted to drive to Haverstraw, and "cut a swell" there, and the agent swore that he let him the horses for that purpose. The arrangement was that the team should be delivered at the defendant's house in the village of Monsey, on July 3, 1898, at half past 12 o'clock in the afternoon. The team was brought to the defendant's residence at Monsey, at the time specified, by the plaintiff's agent, who then asked the defendant where he intended driving. According to the testimony of this witness, the defendant responded: "I am going direct to Haverstraw, put the team in, have them fed and cared for, and return home in the evening." The witness responded: "You need not hurry to get home. If you are detained by your friends longer than you expect, come home at 10 o'clock, and later, if necessary; but don't injure the team." Accompanied by a friend, the defendant drove the team to Haverstraw by way of Nanuet and the Short Clove, which is a somewhat longer route than another road which he might have taken. The day was extremely hot, and on the way

²⁹ As to necessity of returning the consideration, see, also, Beickler v. Guenther, ante, p. 256, Wuller v. Chuse Grocery Co., ante, p. 262, and Harvey v. Briggs, ante, p. 270.

See, also, Nielson v. International Text-Book Co., 106 Me. 104, 75 Atl. 330 (1909).

³⁰ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 221, 222.

homeward in the evening one of the horses was overcome, and died from the effects of what we must assume to have been heat and overexertion.

This action is brought to recover damages against the defendant for a malicious abuse of the plaintiff's team, resulting in the death of one of the horses and injury to the other. The complaint also alleges that the defendant drove said team not only to Haverstraw, but to divers other and more distant places in and about the county of Rockland. The answer contains a denial of the material allegations of the complaint, except those which relate to the hiring of the team, and also sets up a plea of infancy.

Although the complaint alleges and the answer admits that the contract of hiring was entered into on or about the 2d day of July, 1898, the testimony on both sides shows that a complete agreement in respect to the letting of the team was made about two weeks earlier. That agreement did not bind the defendant to drive to Haverstraw by the shortest route. It left him at liberty to pursue any usually traveled road which people were accustomed to take who desired to go from Monsey to Haverstraw. The voluntary statement on his part, when the team was brought to his residence on the 3d of July, that he proposed to go direct to Haverstraw, did not, under the circumstances, in my opinion, become a binding part of the contract of hiring; but, if I am wrong in this, I am nevertheless of opinion that the use of the word "direct" did not necessarily imply an engagement to go by the very shortest way. It should be regarded as signifying merely the defendant's intention to proceed by some usual and expeditious route, without diverging from it.

In this view it becomes immaterial whether the contract was to drive direct to Haverstraw, or merely to drive to Haverstraw. In neither aspect of the case does the evidence establish any substantial departure from the terms of the contract. The doctrine that a person who hires a horse for a specified journey is liable for conversion if he drives the horse further than the stipulated journey, or on another and different trip, cannot be pressed so far as to make the hirer chargeable as for a tort, merely by reason of slight and immaterial departures from the general course of the direction outlined in the contract. This qualification of the doctrine was recognized by the learned trial judge, who properly charged the jury that there must be a substantial and material departure from the contract of hiring in order to render his plea of infancy unavailable to the defendant.

But, in my opinion, the defendant was entitled to a dismissal at the close of the evidence on both sides, and the case should not have been submitted to the jury at all. The rule applicable to the case cannot be better stated than it is in the language of Chancellor

Kent in *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561, where he says: "The contract of an infant is not void, but is voidable at the election of the infant. If a horse is let to him to go a journey, there is an implied promise that he will make use of ordinary care and diligence to protect the animal from injury, and return him at the time agreed upon. A bare neglect to do either would not subject him or an adult to an action of trespass, the contract remaining in full force. But, if the infant does any willful and positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to the immediate possession. If he willfully and intentionally injures the animal, an action of trespass lies against him for the tort." See, also, *Moore v. Eastman*, 1 Hun, 578, and cases there cited.

It is essential, to hold an infant for trespass in a suit like this, to show that the injury to the horse was willful and intentional. A mere lack of moderation in driving, and a failure to observe due care, where there is no willful and intentional injury, will not suffice to render an infant liable. As Chief Justice Cooley says: "If case be brought against an infant for the immoderate use and want of care of a horse which has been bailed to him, infancy is a good defense; the gravamen of the complaint being merely a breach of the implied contract of bailment." Cooley, *Torts* (2d Ed.) 123.

There is no evidence in the present case sufficient to warrant a finding that the injuries which the plaintiff's team sustained were intentionally inflicted by the defendant. On the contrary, it is tolerably plain that the death of one of the horses and the sickness of the other were simply due to the fact that they were driven a long distance during the hottest portion of an exceptionally hot day in midsummer. The only testimony tending to show that there had been a material departure from the terms of the contract by driving to Nyack instead of to Haverstraw was furnished by the alleged admission of the defendant to that effect immediately after the death of the plaintiff's horse. This admission, however, was fully explained by the defendant, who said that he was frightened and excited at the time of the accident, and might have said to the plaintiff's representative at the livery stable that he went to Nyack instead of Haverstraw, but that, if he did so, he meant New City, and not Nyack. This statement, taken in connection with his own positive denial and that of his friend, and the proof on both sides that they had been to Haverstraw, and spent the afternoon there, did not leave more than a scintilla of evidence in the case to show that the team had been driven to Nyack.

Upon this record no verdict based on a finding that the defendant drove to Nyack instead of Haverstraw could be sustained for a moment. I think it is clear that whatever liability can be predicated upon the defendant's management of the plaintiff's team

arises out of contract, instead of tort, and to this liability his infancy constituted a complete defense. I am therefore in favor of reversing the judgment. Judgment and order reversed, and new trial granted.

CHURCHILL v. WHITE.

(Supreme Court of Nebraska, 1899. 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64.)

NORVAL, J.³¹ This was an action by George M. White against Howard Churchill to recover damages to plaintiff's buggy, alleged to have been caused by the wrongful act of the defendant. From a judgment for \$60, entered on a verdict for plaintiff, the defendant has prosecuted this error proceeding.

The first assignment of error challenges the sufficiency of the petition filed in the court below, and upon which the cause was tried. Plaintiff, for a cause of action, alleges, in substance and effect, that plaintiff is engaged in the livery business at Clay Center, furnishing horses, harness, buggies, etc., for hire to those who may desire the same; that the defendant is a minor of the age of 19 years, residing with his father near the town; that on October 23, 1894, defendant hired from plaintiff a livery rig, consisting of a span of horses, a set of harness, and a two-seated covered buggy, to go four or five miles immediately south of Clay Center, to a dance at the residence of one A. R. Baker, and agreed to, and did, pay plaintiff, as use for said team, harness, and buggy, the sum of \$1.50; that defendant, after obtaining possession of said rig, drove the same to the town of Harvard, situate 2½ miles west and 6½ miles north of Clay Center; thence, after obtaining or receiving other passengers, he drove to said Baker's residence, where he remained a few minutes, and drove the rig, with five passengers, directly west 2¾ miles, thence north 1½ miles, to Harvard, and thence to Clay Center; that the defendant, while said rig was in his possession, and being driven out of the line of the route from Clay Center to the place of the dance, and on the return trip from Baker's to the town of Harvard, permitted the buggy to upset, and the team to run several rods, thereby breaking the buggy in numerous places, described with great particularity in the petition, cutting and bruising the heel of one of the horses; that the team was overdriven; and that defendant drove the rig in a direction, and used the same for a purpose, different than that for which it was hired. By reason thereof plaintiff has been damaged in the sum of \$100.

The contention of defendant below (plaintiff herein) is that the action is founded upon a contract with an infant, and therefore no

³¹ Part of the opinion is omitted.

recovery against him can be had. While, ordinarily, infants are not liable on their contracts, except for necessaries, they are answerable for their torts. In 10 Am. & Eng. Enc. Law, 668, 669, the rule is stated thus: "An infant is liable for all injuries to property or person wrongfully committed by him. His privilege of infancy is given to him as a shield, and not as a sword, and it cannot be used for protection against the consequences of wrongful acts; for, where civil injuries are committed by force, the intent of the perpetrator is not regarded. * * * Although an infant is liable for his torts, he is not liable for the tortious consequences of his breach of contract. Whether the form of the action be contract or tort, the infant cannot be held for a mere violation of contract, but the contract cannot avail if the infant goes beyond the scope of it. The tort must be a distinct and substantive wrong in itself, even though it grow out of a contract, to make the infant liable. The contract must be generally put in proof to support the action, but that is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved."

The text is abundantly sustained by judicial decisions. Although no recovery can be had against an infant for a breach of contract, the principle is well recognized, and has been often applied, that he is liable for a tort committed by him, notwithstanding it may have arisen out of, or in some way may have been connected with, a contract. * * * In *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340, it was held that where an infant hires a horse and buggy of a keeper of a livery stable to go to a designated place, and drives beyond the place or in another direction, and injures the horse, the infant is liable therefor. To the same effect are *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Rotch v. Hawes*, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Fish v. Ferris*, 3 E. D. Smith (N. Y.) 567.

In *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85, an infant who hired a horse to drive to an agreed place, 23 miles distant, returned by a circuitous route, which nearly doubled the distance, and stopped at a house on the way, leaving the horse standing out of doors during the night, without food, and it died from overdriving and exposure. It was decided that the infant was liable in damages, by reason of his having departed from the object of his bailment. Redfield, J., in delivering the unanimous opinion of the court, said: "So long as the defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse or to drive him moderately; but, when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission. And this is no hard-

ship; for the infant as well knows that he is perpetrating a positive and substantial wrong when he hires a horse for one purpose, and puts him to another, as he does when he takes another's property by way of trespass." This case was cited by the same court, and the principle applied, in *Ray v. Tubbs*, 50 *Vt.* 688, 28 *Am. Rep.* 519.

Eaton v. Hill, 50 *N. H.* 235, 9 *Am. Rep.* 189, was an action against an infant to recover damages for having so carelessly and inmoderately driven plaintiff's horse, which he had hired, as to cause the animal's death. The plea was infancy. Bellows, *C. J.*, in passing upon the question, employed the language following: "We think, then, that the doctrine is well established that an infant bailee of a horse is liable for any positive and willful tort done to the animal distinct from a mere breach of contract, as by driving to a place other than the one for which he is hired, refusing to return him on demand after the time has expired, willfully beating him to death, and the like; so, if he willfully and intentionally drive him at such an immoderate speed as to seriously endanger his life, knowing that it will do so. * * * When the infant stipulates for ordinary skill and care in the use of the thing bailed, but fails from want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege based upon his want of capacity to make and fully understand such contracts should shield him. * * * But when, on the other hand, the infant wholly departs from his character of bailee, and, by some positive act, willfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no bailment, even if *assumpsit* might be maintained in case of an adult, on a promise to return the thing safely."

In the case in hand the petition discloses, and the evidence adduced by plaintiff on the trial tends strongly to establish, that the tort of the defendant was not committed under the contract, but by absolutely abandoning or disregarding it, or in departing from the terms thereof. The petition is not framed upon the theory of a breach of contract, but for the tort, and contains sufficient averments to constitute a cause of action, notwithstanding the infancy of the defendant.

The seventh instruction is criticised, which reads as follows: "You are instructed, gentlemen, that, so far as this case is concerned, the infancy of the defendant does not affect the liability. The rule that one who hires property of this kind for one purpose, and uses it for another or different purpose from that contemplated by the parties in the contract of hiring, is liable for any harm that may happen it while he is so using it, applies to minors as well as to adults." This instruction harmonizes with the views which we have already expressed, and is within the doctrine announced in

the cases cited above. This portion of the charge did not withdraw from the consideration of the jury whether or not the defendant used the team and buggy for a purpose different from that contemplated by the contract of hiring. Such question was fairly submitted to the jury by other instructions, which expressly advised the jury there could be no recovery if the defendant did not hire the property for a specific and designated trip or route of travel, or to drive to a specific place.

Under the theory of neither party was the infancy of the defendant material or an important consideration, since it could not influence the decision either way. If the team was hired to drive to Mr. Baker's, as plaintiff insisted was the agreement of the parties, then it was driven nearly 50 miles, instead of 10 miles, the distance from Clay Center to Baker's, and return, by the usual route of travel. * * * Judgment affirmed.⁸²

⁸² Liability of parent for tort of infant, see *Lessoff v. Gordon*, ante, p. 174, and *Brittingham v. Stadiem*, ante, p. 177.

PERSONS NON COMPOTES MENTIS AND ALIENS

I. Contracts of Insane Persons¹

SWARTWOOD v. CHANCE.

(Supreme Court of Iowa, 1906. 131 Iowa, 714, 109 N. W. 297.)

Suit in equity to set aside and cancel a deed on account of the mental incapacity of the grantor, the plaintiff's ward. There was a judgment dismissing the plaintiff's action, and quieting the title in the defendant. The plaintiff appeals.

SHERWIN, J.² Prior to January 4, 1905, Roy A. Swartwood, the plaintiff's ward, was the owner of 80 acres of land, which was then of the value of from \$3,200 to \$3,600. The 80 was incumbered by a mortgage of \$2,000 on which there was \$100 interest due. About said date Swartwood traded his equity in the land to the defendant on a valuation of \$4,000 for the land, or \$1,900 for his equity therein, taking in exchange therefor a Norman stallion at the agreed price of \$1,800 and the balance in other personal property. After the trade had been completed by the transfer of the land and personal property, the plaintiff was appointed guardian of Roy A. Swartwood and thereafter brought this action to set aside the deed and rescind the contract, alleging in his petition that his ward was insane at the time of the trade and offering to place the defendant in *statu quo*.

The important and controlling question is purely of fact, for, if Roy A. Swartwood was mentally incapable of making a valid trade, the conveyance to the defendant should be set aside under the rule of our decisions in similar cases. It is the rule of this court that an executed contract may be avoided upon the ground that the party was incapable of contracting, when the other party's property may be restored to him and he be placed in *statu quo*. *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Behrens v. McKinzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Ashcraft v. De Armond*, 44 Iowa, 234; *Alexander by his Guardian v. Haskins et al.*, 68 Iowa, 73, 25 N. W. 935; *Warfield v. Warfield*, 76 Iowa, 633, 41 N. W. 383. And this rule seems to obtain whether the other party knew of the disability or not, and regardless of the fairness of the transaction or the fullness of the consideration. See cases cited above.

¹ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 230-234.

² Part of the opinion is omitted.

To avoid a contract or deed, however, on the ground of insanity, it must be satisfactorily shown that the party was incapable of transacting the particular business in question. It is not enough to show that he was the subject of delusions not affecting the subject-matter of the transaction, nor that he was, in other respects, mentally weak. A party cannot avoid a contract, free from fraud or undue influence, on the ground of mental incapacity unless it be shown that his insanity was of such character that he had no reasonable perception or understanding of the nature and terms of the contract. *Campbell v. Campbell*, 51 Iowa, 713, 2 N. W. 541; *Burgess v. Pollock*, 53 Iowa, 273, 5 N. W. 179, 36 Am. Rep. 218; *Elwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 740.

We have read the record in this case with care and are convinced that it wholly fails to show the mental incapacity necessary to avoid the deed. * * * The judgment of the trial court is right, and it is affirmed.

II. Contracts of Drunken Persons³

CAMERON-BARKLEY CO. v. THORNTON LIGHT & POWER CO.

(Supreme Court of North Carolina, 1905. 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532.)

Action by the Cameron-Barkley Company against the Thornton Light & Power Company. From a judgment for defendant, plaintiff appeals.

WALKER, J.⁴ This action was brought to recover damages for the breach of a contract whereby the plaintiff agreed to sell, and the defendant to buy, a Corliss engine. The case was heard at a former term (137 N. C. 99, 49 S. E. 76) upon a petition for a certiorari. We ordered the writ to issue, so that the plaintiff's exceptions and assignments of error could be more accurately stated.
* * *

The defendant, in its answer, admitted that its president had signed a contract, and pleaded specially that at the time of signing it he was so drunk that he did not have sufficient mental capacity to contract with the plaintiff for the engine. * * *

The question presented for our consideration arises upon an exception to the charge of the court regarding the drunkenness of the

³ For discussion of principles, see *Tiffany, Persons & Dom. Rel.* (3d Ed.) §§ 242, 243.

⁴ Part of the opinion is omitted.

plaintiff's agent, and its sufficiency to avoid the contract. It is held by some authorities to be a principle of the common law that every contract which a man non compos mentis makes is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by himself, received by the law to stultify himself, and to set up his own disability in avoidance of his acts. *Beverly's Case*, 4 Rep. 123. And Coke, as appears in his *Institutes*, was of the same opinion: "As for a drunkard who is voluntarius dæmon, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." *Co. Litt.* 247a. But Blackstone observes that this doctrine sprung from loose authorities, and he evidently agrees with *Fitzherbert*, who rejects the maxim as being contrary to reason. 2 Blk. 291.

Whatever was the true principle of the common law, as anciently understood, there can be no doubt that since the reign of Edward III, if not since the time of Edward I, it has been settled, according to the dictates of good sense and common justice, that a contract made by a person so destitute of reason as not to know the nature and consequences of his contract, though his incompetence be produced by intoxication, is void, and even though his condition was caused by his voluntary act, and not procured through the circumvention of the other party. Mere imbecility of mind is not sufficient as a ground for avoiding the contract, when there is not an essential privation of the reasoning faculties or an incapacity of understanding. 2 Kent, 451. This court has adopted Coke's definition, that a person has sufficient mental capacity to make a contract if he knows what he is about. *Moffit v. Witherspoon*, 32 N. C. 185; *Paine v. Roberts*, 82 N. C. 451. And it has been held not error to charge that the measure of capacity is the ability to understand the nature of the act in which he is engaged, and its full extent and effect. *Cornelius v. Cornelius*, 52 N. C. 593.

The doctrine that a party may plead his own disability to defeat the alleged contract arises out of the very nature of a contract, which requires that the minds of the parties should meet to a common intent, and, if one of them has not "the agreeing mind," the contract cannot be formed. In *Hawkins v. Bone*, 4 F. & F. 311, Chief Baron Pollock said: "But the law of England is that a man is not liable on a contract alleged to have been made by him in a state in which he was not really capable of contracting. A contract involves a mutual agreement of two minds, and, if a man has no mind to agree, he cannot make a valid contract." And the question at last is whether he was wholly incapable of any reflection or deliberate act, so that in fact he was unconscious of the nature of the particular transaction. It is not necessary that he should be able to act wisely or discreetly, nor to effect a good bargain, but he must at least know what he is doing.

So far as the legal incapacity is concerned, it can make no difference from what cause it proceeded—whether by the party's own imprudence or misconduct or otherwise. It is the state and condition of the mind itself that the law regards, and not the causes that produced it. If from any cause his reason has been dethroned, his disability to contract is complete. *Bliss v. Railroad*, 24 Vt. 424. The Master of the Rolls (Sir William Grant), in *Cook v. Clayworth*, 18 Vesey, 15, said: "As to that extreme state of intoxication that deprives a man of his reason, I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition." Lord Ellenborough, in *Pitt v. Smith*, 3 Camp. 33, thus states the doctrine: "You have alleged that there was an agreement between the parties, and this allegation you must prove, as it is put in issue by the plea of not guilty; but there was no agreement between the parties if the defendant was intoxicated in the manner supposed when he signed this paper. He had not an agreeing mind. Intoxication is good evidence upon a plea of non est factum to a deed, of non concessit to a grant, and of non assumpsit to a promise."

The authorities sustaining the view of the law we have stated and adopted are quite numerous. *Clark on Contracts* (2d Ed.) p. 186; *Parsons on Cont.* (9th Ed.) p. 444; *Matthews v. Baxter*, L. R. Exch. 132; *Webster v. Woodford*, 3 Day (Conn.) 90; *Van Wyck v. Brasher*, 81 N. Y. 260; *Bursinger v. Bank*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848; *Bush v. Breinig*, 113 Pa. 310, 6 Atl. 86, 57 Am. Rep. 469; *Bates v. Ball*, 72 Ill. 108; *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; 14 Cyc. 1103; 17 A. & E. Enc. 399. It was held in *King's Ex'rs v. Bryant's Ex'rs*, 3 N. C. 394, that if a man was so drunk at the time of signing a bond that he did not know what he was doing, and while in that condition he was induced to sign the instrument, it was a fraud upon him which vitiated the bond, even in an action at law upon it; and to the same effect is the decision of the court in *Gore v. Gibson*, 13 M. & W. (Exch.) 623—opinion of Parke, B. In the latter case, Pollock, C. B., said: "Although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice." * * * No error.

III. Aliens ⁵

LEHMAN v. STATE ex rel. MILLER.

(Appellate Court of Indiana, Division No. 2, 1909. 88 N. E. 365.)

Suit by the State, on the relation of Miller, Attorney General, against Catherine Lehman and others to enforce the escheat of property. From a judgment for the State, defendants appeal.

COMSTOCK, P. J. On June 7, 1904, the appellee, the state of Indiana, on the relation of Charles W. Miller, its Attorney General, filed its second amended information in the court below to recover, under section 3941, Burns' Ann. St. 1908, of the appellants, and to quiet title to certain real estate in the city of Indianapolis, which was owned at the time of his death by one John Lehman, who died intestate, a naturalized citizen of the United States and a resident of Marion county, Ind., on July 21, 1894, and who left surviving him certain heirs, all of whom were then, and such of them as are still alive and the descendants of those who are dead are still, residents and citizens of the republic of Switzerland. A trial was had by the court, and judgment rendered in favor of the appellee. The errors assigned, and not waived, challenge the correctness of each of the conclusions of law 1, 2, and 3.

Section 3941, Burns' Ann. St. 1908 (section 3333, Burns' Ann. St. 1901), or so much thereof as is necessary for the determination of the question here involved, is as follows: "All other aliens [other than those having declared their intention, etc., as provided in section 3940] may take and hold land by devise and descent only, and may convey the same at any time within five years thereafter, and no longer, and all lands so left and remaining unconveyed at the end of five years shall escheat to the state of Indiana. * * *"

It is claimed by appellants that said section (3941, Burns' Ann. St. 1908; section 3333, Burns' Ann. St. 1901) is in conflict with article 5 of the treaty between the United States and the Swiss Confederation, ratified November 8, 1855 (11 Stat. 590), which reads as follows:

"Art. 5. The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner; and their heirs, whether by testament, or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession

⁵ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 247-252.

thereof, either by themselves, or by parties acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case.

* * * The foregoing provisions shall be applicable to real estate situated within the states of the American Union, or within cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate. But in case real estate situated within the territories of one of the contracting parties shall fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the state or canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the state or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

The special finding of facts may be summarized as follows: John Lehman, a native of Switzerland, made application on the 19th day of October, 1880, and became a citizen of the United States, and of the state of Indiana, and during all of said period until his death resided in the county of Marion in said state; that said John Lehman became owner of certain properties in the years 1881, 1883, and 1888 by deeds of conveyance; that he, from the dates of said several conveyances continuously remained, and at the time of his death was, the owner in fee simple of said several pieces of real estate; that he died intestate at Indianapolis, Ind., on the 21st day of July, 1894, leaving surviving him as his only heirs at law certain heirs (naming them); that all of the defendants hereto were at the time of the death of said John Lehman, and have continuously thereafter remained, and now are, residents and citizens of Switzerland; that his estate was duly administered, and the administrator discharged; that the defendants are all, and are the sole and only, heirs at law of said John Lehman, deceased, and there are no heirs of John Lehman now or heretofore residents of the state of Indiana, or who are, or at any time have been, citizens of the United States of America. That no part or portion of said real estate above described, or any interest in the same, has ever been conveyed by either or any of the defendants, or any other person, since the death of said John Lehman, but since the death of said John Lehman, his heirs, through an agent in Indianapolis, have been collecting and receiving the rents, income, and profits from said real estate up to the time of the commencement of this action, since which time they have been paid to a receiver heretofore appointed in this cause, and the defendants claim to be the owners

of said real estate above described by inheritance from said John Lehman, deceased, as aforesaid.

Upon the above finding the court stated its conclusions of law, in substance, as follows: (1) That said section 3941, supra, was not in conflict with any provision of the treaty between the United States and Switzerland, ratified on, to wit, November 8, 1855; (2) that the real estate (described) had escheated to the state of Indiana for the common school fund; (3) that the claims of the defendants are a cloud upon the title of said state of Indiana to the said real estate, and should be forever quieted and confirmed against the claims of the defendants, etc.

Appellant insists that article 5 of said treaty makes provision for two distinct classes of aliens, to wit: Those who are, by the laws of the state or canton, entitled to hold or inherit real estate, and those who on account of being aliens are not permitted to hold real estate; that the treaty recognizes the right of either country to deny to foreigners the right to hold or inherit real estate, but by the provisions of said treaty where they do inherit their rights are governed by the provisions relating to personal property, and not under the last clause thereof, which provides for a limitation such as the state or canton may establish. Treaties are a part of the supreme law of the land. State laws must give way to treaties made by the federal government. Lewis' Sutherland, Stat. Const. § 22, p. 38; *Blythe v. Hinckley*, 127 Cal. 431, 59 Pac. 787; *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 454; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182. Subject to the provisions of the organic law of the state, if any, relating thereto and the Constitution, laws, and treaties of the United States, the state, through its General Assembly, has full power to regulate the law of descent, and to determine whether aliens shall be permitted to hold real estate, and, if so, to what extent and under what circumstances.

The question in this cause is whether the statute in question is in conflict with the treaty of 1850, between the United States and the Swiss Confederation. We think it is firmly settled, except in so far as limitations have been placed on the inherent sovereignty of the states by treaty, that the state may deny aliens the privilege of inheriting lands; and it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. *Donaldson v. State ex rel. Taylor* (Ind.) 67 N. E. 1029; *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168; *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; *Blythe v. Hinckley*, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84. In construing statutes that construction is favored which gives effect to every clause

and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which would give it effect. 26 Am. & Eng. Ency. of Law (2d Ed.). In negotiating the treaty of 1850 the federal government, recognizing that states might not permit aliens to hold real estate, provided that in such states where aliens are not "permitted to hold such property" "there shall be accorded to the said heir, or other successor, such term as the laws of the state or canton will permit to sell property," and he shall be at liberty to withdraw and export the proceeds without any other charges than inhabitants of the country would pay.

A distinction is made in the treaty between the words "inherit" and "hold." The statute of 1881 in this state made a distinction between acquiring and holding real estate. Acts 1881, p. 84, c. 8, § 1. The title to the act was: "An act to authorize aliens to hold title to real estate, convey the same," etc. Section 1 provided: "Natural persons, who are aliens, whether they reside in the United States, or any foreign country, may acquire, hold and enjoy real estate," etc. In section 1 of the act of 1885, in controversy here (Acts 1885, p. 79, c. 51; section 3332, Burns' Ann. St. 1894), it is provided: "That all aliens residing in the state of Indiana, who shall have declared their intentions to become citizens of the United States conformably to the laws thereof, may acquire and hold real estate in like manner as citizens of this state." Section 2 of the act of 1885 (section 3333, Burns' Ann. St. 1894) reads: "All other aliens may take and hold lands by devise and descent only, and may convey the same at any time within five years," etc.

A distinction is made between "acquiring," "taking," and "holding." A limitation on the taking or acquiring is made. An alien not residing in the state, and who has not made a declaration of citizenship, cannot take by purchase, but can take only by devise and descent. Such an alien can hold and convey only for a limited period of five years, at the end of which period the lands shall escheat. In this state aliens are thus entitled to inherit for a limited purpose and a qualified estate. In *Donaldson v. State*, *supra*, it is pointed out that the power to take by descent and the power to transmit by descent are two separate and distinct powers; that the alien at common law could neither take nor transmit title to real property by descent; that his power to do either is dependent upon the statutes of the state in which the real estate is situated. There is a well-defined meaning to the word "hold" as applied to real estate. Its meaning in connection with the title to real estate is sometimes different from the mode of acquisition. It has to do with the duration or tenure of the estate.

In *Runyan v. Coster*, 14 Pet. 122, 10 L. Ed. 382, the Supreme

Court makes this distinction, and says: "The doctrine of the Supreme Court of Pennsylvania, in the case of *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313, is directly applicable to this case. The question then before the court was as to the right of the bank of North America to purchase, hold, and convey the land in question, and the court took the distinction between the right to purchase and the right to hold lands, declaring them to be very different in their consequences, and that the right of a corporation in this respect was like an alien, who has power to take, but not to hold, lands, and that, although the land thus held by an alien may be subject to forfeiture after office found, yet until some act is done by government, according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not defeasible by the commonwealth." See, also, *Hickory Farm Oil Co. v. Buffalo*, etc., R. Co. (C. C.) 32 Fed. 22.

In the case of *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84, the question had reference to a statute similar to the statute here under consideration, which accorded to nonresident aliens a period of three years to sell land which might fall to them by descent, in which case a right under a treaty between the United States and the German Empire was set up as being in conflict with, and superior to, the statute. It was claimed that appellant took such an interest in the lands in controversy as they could hold until it was assailed in a direct proceeding instituted by the state. But the court held that, as the appellant had no power to take in default of any competent heirs capable of inheriting, the land escheated to the state, and distinguishes between the power to take and the power to hold.

Under the language of the third and fourth clauses of article 5 of the treaty, referring to the power to hold, and the rights of Swiss aliens in the states of America in respect to lands, there are three supposable cases with which the treaty has to deal: First, states in which nonresident aliens may both inherit and hold; second, states in which nonresident aliens may inherit, but not hold; third, states in which nonresident aliens may neither inherit nor hold. In the first case they shall have the same right that they have in regard to personal property; that is to say, they shall have the right to transmit to their heirs by devise or by descent. They may take possession by themselves or by parties acting for them. They may dispose of the same paying no other charges than those which the inhabitants of the country are liable to pay. They shall have equal rights to the protection of the laws relating to probate and administration with the inhabitants of the country. The second and third cases are dealt with by the fourth clause of article 5, providing for states in which aliens could not be permitted to hold

such property. The classification is based upon a disqualification to hold, and prescribes what shall be the rights of aliens in those states in which they are not permitted to hold.

In respect to this clause the Supreme Court of the United States, in the case of *Hauenstein v. Lynham*, *supra*, said that it was competent for a state under this provision—by-law—to prescribe the limitation of time to be allowed Swiss citizens to sell land which might fall to them by inheritance for the purpose of removing the proceeds, saying: "If a state or canton had a law which imposed a limitation in this class of cases, nothing more was necessary. If it had not such a law, it was competent to enact one, and until one exists, there can be no bar arising from the lapse of time." The law of Indiana grants precisely what the treaty guarantees, a right to have the inheritance, and to hold the same for a limited time for the purpose of sale and the withdrawal of the proceeds, and prescribes that, if the privilege is not availed of within the term allowed by the act, the estate shall escheat.

Chief Justice Marshall, in *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234, with respect to just such an act granting a defeasible term to alien heirs, said: "But to this enacting clause is attached a proviso that whenever any subject of France shall, by virtue of this act, become seised in fee of any real estate, his or her estate, 'after the term of ten years be expired, shall vest in the state, unless the person seised of the same shall, within that time, either come and settle in, and become a citizen of, this or some other of the United States of America.' The heirs of John Baptist Chirac, then, on his death, became seised of his real estate in fee, liable to be defeated by the nonperformance of the condition in the proviso above recited. The time given by the act for the performance of this condition expired in July, 1809, four months after the institution of this suit. It is admitted that the condition has not been performed, but it is contended that the nonperformance is excused, because the heirs have been prevented from performing it by the act of law and of the party. The defendant, in the court below, has kept the heirs out of possession, under the act of the state of Maryland, so that they have been incapable of enfeoffing any American citizen, and, having been thus prevented from performing one condition, they are excused for not performing the other. Whatever weight might be allowed to this argument were it founded in fact, its effect cannot be admitted in this case. The heirs were not disabled from enfeoffing an American citizen. They might have entered, and have executed, a conveyance for the land. Having failed to do so, their estate has terminated, unless it be supported in some other manner than by the act of Maryland."

Said treaty provides for two different classes of laws: (1) Where the laws of the state permit aliens to hold or inherit; and

(2) where they are not permitted to hold. In the latter case the treaty expressly provides that the state or canton may fix the term in which to sell said property. Were the construction insisted by appellant to be placed upon the same, there would be no need of the last clause, because in every case they inherited they would fall within the first clause, *supra*. By the laws of our state aliens are not permitted to hold real estate, and, consistent with the last clause of said treaty, have limited the time in which they may transfer the same.

The court did not err in its conclusions of law. Judgment affirmed.

PART V

MASTER AND SERVANT

MASTER AND SERVANT

I. Creation of the Relation¹

INGALLS v. ALLEN.

(Supreme Court of Illinois, 1890. 132 Ill. 170, 23 N. E. 1026.)

Action by Joseph C. Allen against Robert S. Ingalls. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals.

SHOPE, C. J. This action was brought by appellee to recover from appellant wages at the rate of \$40 per month, from January 1, 1885, to November 1, 1887, during which time appellee claimed to have been in the service of appellant; and also to recover \$150, which appellee claimed appellant promised him if a certain farm of appellant's should be sold by appellee's aid, and for some items of money advanced. Appellee went to Kansas to oversee and manage a ranch for appellant under an agreement, as appellee testifies, that he was to be paid \$40 per month, and his board, and the expenses of traveling. Appellant admits that appellee went to Kansas to manage his ranch, but denies that there was any contract as to what his wages should be, and contends that he was not qualified for or capable of managing the ranch, or performing what he undertook to perform. In the spring of 1886 appellee returned from Kansas, and, as he claimed, by direction of appellant, went to work for him at Oak Park in and about an hotel and livery stable which appellant was operating at that place. Appellant insists that appellee was not in his employ at Oak Park, but that he was appellant's partner in running the livery stable, and boarded at appellant's hotel, and appellant claims to recover for said board in his suit by way of set-off. Appellee testified that nothing was

¹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 257, 258.

said about the rate of wages when the employment was changed from the Kansas ranch to the Oak Park hotel and livery stable, and that he had no connection with the stable at Oak Park except to look after it.

On this state of facts, the following instruction was given: "If the jury believe from the evidence that the defendant employed the plaintiff at an agreed sum per month and expenses, to proceed to Kansas and take charge of a farm, the property of defendant, for an indefinite period; and that, subsequently, defendant requested plaintiff to return to Chicago, and proceed to Oak Park to do certain other work for defendant, and the plaintiff did both, with no other or different arrangements as to salary and expenses,—then plaintiff is entitled to recover for the full time he so remained in defendant's employ, at the rate agreed upon in the first instance." Appellant insists that the employment was for superintending his Kansas ranch only, and that ended when the ranch was, by appellant, sold to Kunde; and that if appellee worked for appellant at Oak Park, which the latter denies, without any new agreement fixing his compensation, appellee is entitled to recover only what his services were reasonably worth.

The rule undoubtedly is that if one person employ another at an agreed price for a time certain, and the employment is continued after the expiration of the time agreed upon, without any new agreement as to price, the presumption is that the parties understood that the original rate of compensation is also to be continued; and it can make no difference that there may be some change in the services required and performed, as that there be an increase or diminution of the labor, so long as it is clearly within the scope of the original employment. The reason is that if the employé remains in the same employment after his term of service has expired without making demands for increased pay, the employer may well presume that no increased compensation is expected or will be required; and having acted upon that presumption, and failed to protect himself by a new contract, the employé will be held to have assented to a performance of the service at the original price. The rights of the employé and employer are mutual and reciprocal. So, where the employer permits a continuation of the service after the term has expired, without a new stipulation as to the price, it will be presumed that he expected and intended to pay for the service the original compensation stipulated. In such case, the recovery will not be upon the quantum meruit, but upon the contract implied by law, and for the compensation presumed to have been fixed by the parties. *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Ranck v. Albright*, 36 Pa. 367; *Factory Co. v. Richardson*, 5 N. H. 295; *Sewing Machine Co. v. Bulkley*, 48 Ill. 189.

If the nature of the service required to be performed be not different from that which the parties had in contemplation when the original contract was entered into, the fact that the services rendered after the original term had expired was at a different place, or may have been of a slightly different character, will not destroy this presumption, if it can be said that such service was a continuation of the original service, and within the scope generally of the original employment. Whether the services rendered in a given case are of the same nature and of the character of service within the view or contemplation of the parties when the original contract was entered into, is a question of fact, and, as such, is proper to be submitted to and be determined by the jury. The instruction proceeds upon the basis that if appellant had agreed to pay "a fixed sum per month to appellee for taking charge of the farm and property of appellant in Kansas, and that subsequently appellant requested appellee to return to Chicago, and proceed to Oak Park, and do certain other work for appellant, and appellee did so without any other arrangement as to compensation, then appellee was entitled to recover for the full time, at the rate of compensation first agreed upon." The jury were not left at liberty to determine whether the "certain other work" was within the scope of the original employment or not, or whether the service rendered at Oak Park, by appellee for appellant, if any, was a continuation by appellee in the original employment under the original contract. If the jury had found that the service at Oak Park was but a mere continuation of the service in Kansas, and was of the same general nature, the law would raise a presumption that it was performed under the original contract of service.

It would seem from the evidence that considerable time elapsed between the time when appellee quit work in Kansas before he entered upon the service at Oak Park; and it was, we think, improper for the court to assume, as it did in this instruction, that if appellant "subsequently" requested the appellee to proceed to Oak Park to do certain other work for appellant, as a matter of law, such other work was a continuation of the service under the original employment, and to be paid for at the price originally agreed upon for the service rendered in Kansas. The fact being established that the employment continued after the expiration of the original term, and the service rendered being of the same general nature and character as that contemplated by the original agreement as before said, the law implies a promise to pay the price agreed upon; but it was, in view of the facts disclosed by this record, error for the court to assume the fact, as was done in this instruction.

It cannot be said that this is error without prejudice. The evidence of whether service was performed by appellee for appellant

lant at Oak Park is conflicting and irreconcilable. And it is by no means so clear, when all the evidence is considered, that the verdict was correct, that we can say that substantial justice has been done. As to whether appellee performed any service for appellant at Oak Park, or, if he did, when such service began, i. e., how soon after the termination of his former service, and the kind and character of service performed, are controverted questions, and evidence was offered sustaining the contention for either of the parties. Is it the law that if appellant, "subsequently" to the termination of the service of appellee under the original agreement, requested appellee to do certain work for him at Oak Park, although of the same general character as that contemplated by the agreement, that a presumption arises that the parties intended that the same price should be received by appellee or be paid by appellant? If so, how long "subsequently" before such presumption would cease?

There is much evidence tending to show that for at least two weeks after appellee had returned to Chicago from Kansas he performed no substantial service; and that that time, or a much longer period of time, elapsed before the service was actually entered upon by him in appellant's hotel and livery stable at Oak Park. We are of opinion that it cannot be said that the presumption necessarily arises because the request was subsequently made, or made after the lapse of any considerable time from the completion of the service under the express agreement. The presumption is only warranted where the service can be said, as a matter of fact, to be continuing.

We find no other error in this record, but for the one indicated the judgment of the appellate and circuit courts must be reversed, and the cause remanded to the circuit court for further proceedings.

II. Termination of the Relation²

1. BREACH BY MASTER

WHARTON v. CHRISTIE.

(Court of Errors and Appeals of New Jersey, 1891. 53 N. J. Law, 607, 23 Atl. 258.)

Suit by J. J. Christie against Joseph Wharton to recover on a contract for wages. Verdict and judgment for plaintiff. Defendant brings error.

² For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 259-261.

BEASLEY, C. J.* My examination of this case has resulted in the conviction that the judgment before us should be reversed. The facts necessary to explain the view thus taken are briefly these: The defendant in error, Christie, was in the employment of Wharton, the plaintiff in error; and this suit is brought by the former for the wages stipulated for in the contract creating such relationship, the ground of action being that he had been unlawfully discharged from the employment, and that consequently he had a right to such agreed wages. The jury has found that the discharge in question was unjustifiable, and of course that fact is at this stage of the proceedings to be assumed. Thus far there is no difficulty in the case. The trouble arises from the step in the business next taken.

The testimony of Mr. Christie (the employé) himself narrates the transaction relating to his discharge; and there is no conflict in the evidence on the subject. The record exhibits the following questions and answers; the Mr. Constable here mentioned being the duly-authorized agent of the employer, the plaintiff in error: "I told him," said Mr. Christie, "that Mr. Wharton [his employer] had forbade me from doing any office work. Question. Well, what did he say? Answer. Mr. Constable said, if I did not make out the estimates, that he would discharge me. * * * I refused, and he discharged me. Q. Then what followed? A. The writing out of a piece of paper; and that was written out for protection—for me to get work elsewhere, if I wanted to apply to any other of these glassmen. Q. How did you happen to write out the piece of paper? A. Well, through Mr. Constable's dictation. Q. Did he tell you to write it out? A. Yes, sir. Q. What was it designed for? A. For me to get employment elsewhere. Q. Explain what you have in mind about that. A. Elsewhere would be into any other establishment. Q. Well, you say to get your employment. Explain all that was said on the subject between you and Mr. Constable. A. Well, a man going to be employed at any other works in the capacity that I had served Mr. Wharton, and being discharged, and it being known, he could not get any other employment. Q. Just tell what occurred. What was said between you and Mr. Constable about it, as nearly as you can recollect it? A. Well it was in words just like this: That this would be of assistance to assist me in getting work—this discharge, or this piece of paper; and my discharge would be kept secret, and nobody would know anything about it. That is what were the words that passed between us."

The piece of paper here referred to was in these words, viz.: "Camden, September 14, 1882. Mr. Joseph Wharton: I hereby resign my position as inside manager of glass-works, to take ef-

* Part of the opinion is omitted.

fect from September 8th. [Signed] J. J. Christie." This writing was then delivered by Christie to Constable, and was accepted by him, and retained until produced at the trial.

From this narration, which is the plaintiff's own, and was in no wise contradicted, it will be observed that the legal question thus presented by these facts is whether an employé can be permitted to set up that his contract of employment still continues to subsist after he has in writing voluntarily presented to his employer his written resignation, which has been accepted? It is to be noted that, when the resignation in the present instance was executed, this was the situation, regarding it from the employer's own point of view: The contract of employment was still in force, as it had in no wise been impaired or ended by the antecedent illegal discharge; and, in this attitude of things, he himself, by his own voluntary act, put an end to it. I say by his own voluntary act, because there is and can be no pretense that there was either fraud or duress in the transaction.

The inquiry therefore presses: On what ground can a resignation of this character be avoided or annulled? Why is it not utterly conclusive? This resignation was a contract in writing between these parties, and it could not be altered by parol. The object or purpose of it was entirely legal, nay, even laudable, as it was designed to enable the employé, who at the worst had committed but a slight offense, if he had committed any, to seek for employment elsewhere without the stigma fixed upon him of having been discharged by his last master for imputed disobedience. The employé had, upon being illegally discharged, the option either to yield to it or to resist, and he chose the former of the alternatives, and evinced such election in the conclusive form of a written resignation. It seems to me, upon the plainest principles of law, that after such an act as this the employé was utterly precluded from asserting in a court of law that the contract between himself and his employer still continued in existence.

On this ground the motion to nonsuit made at the trial should have prevailed. And this error ran into the charge of the trial judge. The jury were told (using the judicial language): "If Wharton, the employer, considered that Christie had been discharged—not that he had resigned, but considered that he had been discharged—then the fact of the existence of this paper, signed by Christie, purporting to be a resignation, does not necessarily prevent his right to recover, unless you consider that it was a resignation, or unless you consider that it was an acquiescence in his discharge." Thus the question whether the paper purporting to be a resignation was such or not was left to the jury. There was no question made as to the execution of the paper. Its terms

were as clear as they could possibly be. So that the question whether it was a resignation or not was purely a legal one, and yet that question was to be settled by a verdict.

It seems to me that the error pervading the entire charge on this subject was this: that the validity of the resignation depended upon the ideas that were entertained by Wharton, the employer, with respect to the fact whether Christie was to be considered as a discharged man, or as one who had voluntarily retired. * * * The instruction at the trial on this head thus proceeded: "But if, on the other hand, Mr. Wharton understood that Constable had discharged Christie, and if Wharton ratified that discharge for what he conceived to be proper cause, then he was not deceived by this paper writing, because he did not consider that the man had voluntarily retired. He considered him as a man who had been compulsorily discharged. You will see the distinction between relying on the paper and relying on a discharge."

Now, I must think this was a plain error in law, because whatever Mr. Wharton thought on the subject referred to could not by any possibility have any effect whatever. At the time of this reported conversation, it is undeniable that the contract between himself and Mr. Christie was at an end, either by the operation of the discharge, or by that of the resignation, or of both. Doubtless Mr. Wharton thought at the time that the discharge was legal, and he, in effect, says so; but how did such belief, or such expression of it, affect in any degree whatever the resignation? Suppose he had directly said that the discharge was legal, and therefore the resignation was ineffectual. Would that have canceled the resignation? It does not seem to me that any one would claim that such would be its effect. The question can be readily tested: Let it be supposed that upon reflection Mr. Wharton had concluded that the discharge in question was unwarrantable, and had notified Mr. Christie to return to his service under his contract. On refusal, would a suit have lain? Certainly it is undeniable that to such a suit by the employer the resignation which had been accepted by the employer would have been a conclusive bar. If this be so it necessarily follows that, if the employer be barred by this instrument, so must the employé be barred.

The question thus presented is of importance, for it relates to the legal efficacy of written agreements. This resignation was a written agreement. It purported to be absolute for all purposes, on its face. Its legal effect was to destroy the contract then existing between this employer and this employé. And yet on this trial the jury has been permitted to say that this paper does not contain the real understanding of these parties; that, contrary to the plain statement of the writing, they did not intend to affect

in any degree the relationship between themselves as employer and employé. My conclusion is that this rule, if adopted in practice, will in a most disastrous manner affect the legal department to which it relates, and will greatly deprive written contracts of that impregnability to the assaults of parol evidence which it has ever been the policy of the law to impart to them. From these considerations, I am led to vote to reverse this judgment.

DEPUE, REED, SCUDDER, CLEMENT, SMITH, and WHITAKER, JJ., concur.

VAN SYCKEL, J. (dissenting). * * * The main ground relied upon for reversal is that Christie, by a written resignation, acquiesced in his discharge. Christie testified that after Constable had discharged him, on the 14th day of September, he wrote out and signed the following paper, and handed it to Constable: "Camden, September 14, 1882. Mr. Joseph Wharton: I hereby resign my position as inside manager of glass-works, to take effect from September 8th. J. J. Christie." He said he wrote this at Constable's dictation, because Constable told him that, if it was known that he was discharged, he could not get employment elsewhere; that his discharge would be kept secret, and this resignation would assist him in getting work in some other place. He denies that he consented to the discharge, and says that he went the next day to Wharton, and asked to be reinstated, which was refused. The trial judge on this branch of the case charged the jury that if this resignation was Christie's voluntary act, and if he ceased to work because of the acceptance by his employer of the proposition contained in that resignation, he could not recover, but if Christie was discharged before he wrote that paper, and his failure to continue work was not due to a voluntary retirement, but to a compulsory retirement, and the paper was written by Christie, at the suggestion of Wharton's agent, for the mere purpose of enabling Christie to secure other employment, then it did not operate as a bar to the action. The trial judge further charged in this behalf that even though Christie did not intend this paper to be a resignation, but simply a device to aid himself to obtain another position, yet if Christie allowed Wharton to remain under the impression that he had voluntarily resigned by this written paper, that operated as an estoppel, and he could not recover. These instructions presented the law as favorably for the defendant below as he was entitled to have it declared. It was, under the evidence, a question of fact for the jury whether the written paper was a voluntary surrender by the plaintiff of his position, or whether, after being compelled against his will to submit to discharge, he resorted to the resignation for the purpose testified to by him, at the suggestion of defendant's agent.

Railroad Co. v. Slack, 45 Md. 161, presented the question in-

volved in this case. The railroad company employed Slack as its general superintendent for a year commencing January 1, 1874, at an annual salary payable monthly. On the 9th of April, 1874, he received the following letter from the president of the company: "New York, April 8, 1874. C. Slack, Esq., Superintendent, Mount Savage—Dear Sir: I am satisfied that the interests of this company require a reorganization of its local management by the concentration of its affairs in Allegany county under one head. Accordingly, I write by to-day's mail to the second vice president, to assume charge of the railroad. Recent circumstances have confirmed the opinion above expressed. I presume you will prefer to retire by means of a resignation. It is hereby understood that the same is accepted, and you will please telegraph me of its transmission, as I have instructed the second vice president to take entire charge of the railroad immediately on receipt of my letter. Please confer with Mr. Millholland in turning over the papers in the superintendent's office. Yours, respectfully, Allen Campbell, President." Slack at once acted in accordance with the request in the letter, by surrendering to the company his charge, and leaving the service of the company. On the next day he addressed to the president of the company the following note: "April 10, 1874. Allen Campbell—Dear Sir: I hereby resign the position of general superintendent of the Cumberland and Pennsylvania Railroad Company, to take effect at once. Yours, truly, C. Slack." In an action of assumpsit brought by the railroad company against Slack to recover money alleged to be due by him to the company, he pleaded his discharge, and claimed to set off the amount due him for salary from the time he left the service of the company to the end of the year. The opinion of the court, delivered by Chief Justice Bartol, held (1) that the letter of the president of the company operated as a positive and peremptory dismissal of Slack from the service of the company; (2) that the note of Slack, written the next day, could not change its character or construction, or show that he voluntarily resigned, nor could it be construed as an acquiescence in his dismissal.

In the case cited the railroad company requested the trial judge to charge that the jury might find that by the letter of April 10th the defendant consented to and acquiesced in the request to resign his place, and, if they did so find, the defendant could not be allowed to set off. The trial judge refused so to charge, and on the review of the case the chief justice ruled that the request was rightly refused; that it presented a question of law for the court, and under the circumstances of the case the jury could not infer acquiescence. In the case under review the charge of the trial judge was more favorable to the employer, as under his instructions it was left to the jury to say whether the conduct of the

employé showed that he had acquiesced in his dismissal, and whether the resignation was in truth and in fact his act. Wharton could not claim to hold the resignation as a shield to himself, if it was given to Constable upon the express agreement that he should use it to save Christie from the consequences of dismissal. If Christie voluntarily tendered his resignation to Wharton, this action of course could not be maintained. But the very question before the trial court was whether Christie was chargeable with giving in such resignation to his employer. His evidence is that he lost his position, not by resignation, but by the wrongful act of his master. He was peremptorily dismissed from service, and for the consequences of such dismissal Wharton's liability to him had become fixed. Nothing was done with the intention of discharging such liability. On the contrary, Christie expressly told Wharton that he wished to retain his position.

Constable had no right to deliver the resignation to Wharton to enable him to set it up as a bar to Christie's action. That was a clear misappropriation of the document; and to permit it, under the circumstances detailed by Christie, to be used for such a purpose, does great injustice. In this review on writ of error the testimony of Christie must be accepted as true. In the face of his testimony that the paper was given for his own benefit to the agent, and not for Wharton's, it would, in my view, have been error in the court below to treat it as a bar to recovery. The questions arising in the case were properly submitted to the jury, and in my opinion the judgment below should be affirmed.⁴

MCGILL, Ch., and MAGIE, KNAPP, BOGERT, and BROWN, JJ., concur with VAN SYCKEL, J.

2. BREACH BY SERVANT

JEROME v. QUEEN CITY CYCLE CO.

(Court of Appeals of New York, 1900. 163 N. Y. 351, 57 N. E. 485.)

Action by Anthony Jerome against the Queen City Cycle Company. From a judgment of the appellate division (24 App. Div. 632, 48 N. Y. Supp. 1107), affirming a judgment entered on the verdict of a jury, defendant appeals.

This action was brought to recover damages for an alleged wrongful discharge of the plaintiff, who had been employed by the defendant for the period of one year to act as superintendent

⁴ Compare *Jones v. Graham & Morton Transp. Co.*, 51 Mich. 539, 16 N. W. 893 (1883).

of its bicycle factory at Lake View, about 20 miles from Buffalo. The defendant admitted that it discharged the plaintiff before the expiration of the term agreed upon, but alleged that the discharge was lawful on account of tardiness, absence, and disobedience of orders. By a written contract entered into by the parties on the 10th of October, 1895, the defendant agreed to employ the plaintiff as superintendent of its factory for one year from said date at a salary of \$2,000, payable monthly. The plaintiff agreed to "give his services" to the defendant, and to "devote his best efforts in the faithful and efficient discharge of the duties of superintendent," during the period and for the compensation aforesaid. It was mutually agreed that the plaintiff should "have full control and discretion as to the employment and dismissal of all help properly engaged in said factory in any capacity."

On May 5, 1896, the defendant, through its president, wrote to the plaintiff, who was a skillful pattern maker, to confine himself "to superintending the designing, pattern making, and drafting in your department, and to such other duties and the execution of such other orders as may be specifically given you by the president. * * * Do not leave your duties during working hours without specific permission of the president. * * * Tardiness will not be permitted. You have left your duty for a number of hours at times recently, and in three cases without any knowledge of the president, and in one case yesterday without his permission, and in direct disobedience to his orders. When you desire to absent yourself, you must apply to the president for permission, stating your reasons and abide by his decision. If any or all of the above conditions are not carefully and strictly observed and complied with, this will be considered sufficient cause for discharge."

One of the employés at the factory, named Fenton, "called a meeting at North Evans," at which he denounced the plaintiff, and called him a "liar, hypocrite, and scoundrel." Soon after, at a second meeting, presumably of the employés, Fenton again denounced him. About May 23d the plaintiff told Mr. Fries, defendant's president, that he was going to Buffalo to take counsel in order to suppress "that fellow's vilification and abuse, and to protect" himself "by legal process." Mr. Fries replied that if he absented himself "that day" for that reason he should consider himself discharged. The plaintiff, notwithstanding, went to Buffalo for the purpose aforesaid, and was gone the entire day. Before leaving, he gave orders in relation to the work of the factory, in which 600 men were employed under his superintendence. He told Mr. Wheeler, who was foreman of the machine department, that "he was going to Buffalo on some private business of his own, and expected to be away all day"; that "he had been threatened with

discharge if he left his business, and that he did not consider that he was tied down so that he could not go and look out for his own affairs.

On the day after he went to Buffalo, plaintiff was discharged for disobedience of orders. The defendant introduced evidence tending to show that the plaintiff was absent without leave both before and after said correspondence, and that, when warned not to repeat it, or he would be discharged, he replied that "he considered he had a right to go to Buffalo or other places on his own private business." There was no evidence that anything went wrong at the factory during any of his absences.

VANN, J.⁵ The relation of master and servant, which existed between the parties, cast certain duties upon the plaintiff that he was bound to discharge, and the foremost was that of obedience to all reasonable orders of the defendant not inconsistent with the contract. Disobedience of such orders is a violation of law which justifies the rescission of the contract by the master and the discharge of the servant. *Edgecomb v. Buckout*, 146 N. Y. 332, 339, 40 N. E. 991, 28 L. R. A. 816; *Lacy v. Getman*, 119 N. Y. 109, 115, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806; *Forsyth v. McKinney*, 56 Hun, 1, 8 N. Y. Supp. 561; *Harrington v. Bank*, 1 Thomp. & C. 361; *Tullis v. Hassell*, 54 N. Y. Super. Ct. 391; *Spain v. Arnott*, 2 Starkie, 256; *Callo v. Brounker*, 4 Car. & P. 518; *Amor v. Fearon*, 9 Adol. & E. 548; *Wood, Mast. & S.* 221, 225; *Smith, Mast. & S.* *139; 14 Am. & Eng. Enc. Law, 789; *Chit. Cont.* [10th Ed.] 628, 629. After complaint had been made in regard to several absences without permission, the plaintiff desired to be absent for an entire day to attend to private business. He did not ask permission, but simply announced his intention to his employer, stating the reason, and was informed that if he absented himself that day for that purpose he would be discharged. He was not told that he could not leave at all, but simply that he could not leave on that particular day. This was, in effect, a command not to leave his work on the day in question; but, notwithstanding, he did leave it, and thus willfully disobeyed the order of his employer. He was at once discharged, and, if said order was reasonable, under the circumstances, the discharge was in accordance with law; but, if it was unreasonable, the discharge was in violation of law.

The plaintiff claims that this was a question of fact for the jury, and as they answered it in his favor, after affirmance by the appellate division, we cannot answer it in favor of the defendant. As the judges of the court below do not appear to have been unanimous in their decision, we have the right to read the record in order to see whether there was any evidence which, accord-

⁵ The statement of facts is abridged.

ing to any reasonable view, would sustain the conclusion of the jury. *Gannon v. McGuire*, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694; *Otten v. Railway Co.*, 150 N. Y. 395, 44 N. E. 1033. If the undisputed facts, in connection with the testimony of the plaintiff, when supported by every inference that can properly be drawn therefrom, do not warrant the verdict, a question of law arises, which we can review. Uncontradicted facts, with the logical deductions therefrom all pointing in the same direction, present a question of law for the court, and not a question of fact for the jury. *Griggs v. Day*, 158 N. Y. 1, 10, 52 N. E. 692; *Ostrom v. Greene*, 161 N. Y. 353, 357, 55 N. E. 919; *O'Brien v. Bridge Co.*, 161 N. Y. 539, 544, 56 N. E. 74, 48 L. R. A. 122.

The construction of the contract is for the court exclusively. The plaintiff expressly agreed "to give his services" to the defendant, and to "devote his best efforts in the faithful and efficient discharge of the duties of superintendent." He impliedly agreed to devote his time to the work of his employer during business hours, unless he was sick, or some other emergency arose to justify his absence. The defendant, in making the contract, did not abdicate its position as master, nor waive control of its business. The plaintiff was, in law, a servant, although of a high grade, with full control and discretion as to hiring and dismissing all the other servants. In other respects he was subject to the reasonable orders of his master, for there was nothing in the contract to relieve him from the duty of obedience required by law. He had charge of an extensive manufactory, where 600 men were at work. The defendant had the right to manage its own business, and to decide whether the services of the plaintiff were necessary at the factory on the day in question. It did so decide, and he had no power to overrule the decision, for that would make the master and servant change places. He did not ask leave to go some other day, and was not told that he could not go some other day, when the situation of the business, in the master's judgment, would permit it. It was unreasonable for the plaintiff, when employed to superintend extensive operations and many men, to take a day off at will, for a private purpose, regardless of the condition of the business or the wishes of his employer. There was no emergency to justify him in leaving important affairs, which he had been hired to look after, for a whole day, in defiance of orders. The defendant had a right to the skill and services during ordinary working hours which he had agreed to give, and for which it was paying him.

There was no occasion for taking counsel in order to prevent one of the employés from calling him names, which were not actionable upon their face, nor otherwise, so far as appears, because he had the absolute power to discharge the obnoxious man at once. It was not reasonable for him to abandon the work he had been

employed to do for such a trifling cause, which, as he admits, was purely personal. The excuse given by him to justify his disobedience of orders presented no question of fact for the jury, for the law does not permit a servant to defy his master unless serious injury threatens him, his family, or his estate. Courts will not permit juries to guess or speculate, when, from the undisputed evidence, it is apparent that the order of the master was reasonable, and that the servant was guilty of insubordination. The inferences from the admitted facts all point one way. What variant inferences are permissible? Not that the plaintiff obeyed orders, for it is conceded that he did not; not that he was in danger of serious injury, for he had a summary remedy in his own hands, which he could resort to at once without leaving his duties; not that it was necessary to at once start a slander suit to protect his reputation, for no slanderous words had been spoken concerning him; not that he went to Buffalo as superintendent, to consult the counsel of the company, for he did not so claim upon the trial. He went, as he stated, for personal reasons, to consult his own counsel upon a subject which was neither important nor urgent.

When the contract is properly construed, we find no evidence to warrant the inference that the order of the master was unreasonable, or the conduct of the servant justifiable. He had been absent without leave several times during a short period. The master, by retaining him after knowledge of these breaches of duty, did not prevent their use as grounds of discharge when the offense was repeated. *Gray v. Shepard*, 147 N. Y. 177, 41 N. E. 500; *Arkush v. Hanan*, 60 Hun, 518, 15 N. Y. Supp. 219. After ample warning, he persisted in disobedience, and the master was not compelled to retain in its employment a servant who willfully violated its lawful orders. The absence, considering the nature of the business and the character of the duties, was not within the contemplation of the contract and was inconsistent with the object of the servant's engagement, which was to advance the master's interest. Whether it resulted in actual injury to the business of the defendant is not the question, for it had that tendency, and would naturally have that effect in a large factory, where something was liable to occur at any moment which would require the presence of the superintendent. It was a violation of duty as matter of law, which justified the master in discharging. The action of the servant was not the result of a mistake, for he was not told not to go, but was willful; and, indeed, it seems as if, encouraged by previous litigation with two different employers, he courted a discharge. The contract and the undisputed evidence conclusively established the right of the master to discharge, and the motion to direct a verdict for the defendant should have been granted.

The judgment appealed from should therefore be reversed, but, as further evidence may be given upon another trial, we do not dismiss the complaint, but grant a new trial, with costs to abide event.⁶

III. Remedies for Breach of Contract—Damages⁷

McMULLEN v. DICKINSON CO.

(Supreme Court of Minnesota, 1895. 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511.)

Action by William McMullen against the Dickinson Company. From an order sustaining a demurrer to the answer, defendant appeals.

CANTY, J. On the 25th of February, 1892, the plaintiff entered into a written agreement with the defendant corporation, whereby it agreed to employ him as its assistant manager, from and after that date, as long as he should own in his own name 50 shares of the capital stock of said corporation, fully paid up, and the business of said corporation shall be continued, not exceeding the term of the existence of said corporation, and pay him for such services the sum of \$1,500 per annum, payable monthly during that time, and whereby he agreed to perform said services during that time. He has ever since owned, as provided, the 50 shares of said stock, and performed said services ever since that time until the 28th of October, 1893, when he was discharged and dismissed by the defendant without cause. He alleges these facts in his complaint in this action, and also alleges that he has been ever since he was so dismissed, and is now, ready and willing to perform said services as so agreed upon, and that there is now due him the sum of \$125 for each of the months of March and April, 1894, and prays judgment for the sum of \$250.

The defendant in its answer, for a second defense, alleges that on March 2, 1894, plaintiff commenced a similar action to this for the recovery of the sum of \$512, for the period of time from his said discharge to the 1st of March, 1894, alleging the same facts and the same breach, and that on April 16, 1894, he recovered judgment in that action against this defendant for that sum and costs,

⁶ Compare Shaver v. Ingham, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712 (1886). See, also, Nelichka v. Esterly & Heineman, post, p. 318.

⁷ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 262, 263.

and this is pleaded in bar of the present action. The plaintiff demurred to this defense, and from an order sustaining the demurrer the defendant appeals.

The plaintiff brought each action for installments of wages claimed to be due, on the theory of constructive service. The doctrine of constructive service was first laid down by Lord Ellenborough in *Gandell v. Pontigny*, 4 Camp. 375, and this case was followed in England and this country for a long time (Wood, *Mast. & Serv.* 254), and is still upheld by several courts (*Isaacs v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 31 Miss. 361; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8). It has been repudiated by the courts of England (*Goodman v. Pocock*, 15 *Adol. & E.* [N. S.] 574; *Wood, Mast. & Serv.* 254), and by many of the courts in this country (*Id.*; and notes to *Decamp v. Hewitt*, 43 Am. Dec. 204), as unsound and inconsistent with itself, as it assumes that the discharged servant has since his discharge remained ready, willing, and able to perform the services for which he was hired, while sound principles require him to seek employment elsewhere, and thereby mitigate the damages caused by his discharge. His remedy is for damages for breach of the contract, and not for wages for its performance. But the courts, which deny his right to recover wages as for constructive service, have denied him any remedy except one for damages, which, if seemingly more logical in theory, is most absurd in its practical results. These courts give him no remedy except the one which is given for the recovery of loss of profits for the breach of other contracts, and hold that the contract is entire, even though the wages are payable in installments, and that he exhausts his remedy by an action for a part of such damages, no matter how long the contract would have run if it had not been broken. See *James v. Allen Co.*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821; *Moody v. Leverich*, 4 *Daly* (N. Y.) 401; *Colburn v. Woodworth*, 31 *Barb.* (N. Y.) 381; *Booge v. Railroad Co.*, 33 Mo. 212, 82 Am. Dec. 160.

No one action to recover all the damages for such a breach of such a contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the gen-

eral rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur. This is not in conflict with the rule that, in an action for retrospective damages for such a breach, the burden is on the defendant to show that the discharged servant could have found employment. In that case, as in others, reasonable diligence will be presumed. When it appears that he has not found employment or been employed, there is no presumption that it was his fault, and, under such circumstances, it will be presumed that the exceptional has happened. But to presume that the exceptional will happen is very different. In an action for such a breach of a contract for services, prospective damages beyond the day of trial are too contingent and uncertain, and cannot be assessed. 2 Suth. Dam. 471; Gordon v. Brewster, 7 Wis. 355; Fowler & Proutt v. Armour, 24 Ala. 194; Wright v. Falkner, 37 Ala. 274; Colburn v. Woodworth, 31 Barb. 385. Then, if the discharged servant can have but one action, it is necessary for him to starve and wait as long as possible before commencing it. If he waits longer than six years after the breach, the statute of limitations will have run, and he will lose his whole claim. If he brings his action within the six years, he will lose his claim for the balance of the time after the day of trial.

Under this rule, the measure of damages for the breach of a thirty year contract is no greater than for the breach of a six or seven year contract. Such a remedy is a travesty on justice. Although the servant has stipulated for a weekly, monthly, or quarterly income, it assumes that he can live for years without any income, after which time he will cease to live or need income. The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent. If the rule of damages were the same, then, in the case of the breach of the contract for service, the discharged servant should be allowed only the amount which the stipulated wages exceed the market value of the service to be performed, without regard to whether he could obtain other employment or not. If the stipulated wages did not exceed the market value of the service, he would be entitled to only nominal damages; and in no case could his failure to find other employment vary the measure of damages. Clearly, this is not the rule. In the one case the liability is a contingent liability for loss of wages; in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too specu-

lative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so, whether prospective or retrospective. "The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented them." 1 Suth. Dam. (1st Ed.) 107.

It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason.

In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial. *Fowler & Proutt v. Armour*, 24 Ala. 194; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. But the wrongdoer can have no such election. He should not be allowed to take advantage of his own

wrong, and, for the purpose of preventing the use of any adequate remedy and defeating any adequate recovery, to insist that his own breach is total.

The order appealed from should be affirmed. So ordered.⁸

IV. Rights, Duties, and Liabilities Inter Se⁹

1. RIGHT TO WAGES

NELICHKA v. ESTERLY & HEINEMAN.

(Supreme Court of Minnesota, 1882. 29 Minn. 146, 12 N. W. 457.)

BERRY, J. The evidence in this case shows that plaintiff was in defendants' employ under an engagement to work for them for the entire month of December for \$50; that plaintiff left defendants' service on December 23d, and remained away for four days without any excuse, and not only without defendants' consent, but in the face of their express objection, and that defendants refused to permit him to re-enter their service upon his return is undisputed, and in fact admitted by both parties. The contract was, then, entire. The plaintiff did not perform on his part. He offers no excuse for his non-performance, but, on the contrary, his failure to perform was wholly his own wilful fault. In such a state of facts he is not entitled to recover anything for the partial performance of his engagement; namely, for the work performed by him prior to leaving defendants' service on December 23d. Metc. Cont. 8; Mason v. Heyward, 3 Minn. 182 (Gil. 116); Williams v. Anderson, 9 Minn. 50 (Gil. 39); Stees v. Leonard, 20 Minn. 494 (Gil. 448); Weber v. Clark, 24 Minn. 354; Beach v. Mullin, 34 N. J. Law, 343.

The verdict is entirely unsupported by the evidence, and the judgment is accordingly reversed.

⁸ See, also, Sutherland v. Wyer, 67 Me. 64 (1877); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875); Liddell v. Chidester, 84 Ala. 508, 4 South. 426, 5 Am. St. Rep. 387 (1887); Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273 (1893); Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010 (1895).

⁹ For discussion of principles, see Tiffany, Persons & Dom. Rel. (3d Ed.) §§ 265-271.

DAVIDSON v. LAUGHLIN.

(Supreme Court of California, 1903. 138 Cal. 320, 71 Pac. 345, 5 L. R. A. [N. S.] 579.)

Action by A. N. Davidson against Homer Laughlin. Judgment for plaintiff, and defendant appeals.

McFARLAND, J.¹⁰ * * * The action is for the recovery of the reasonable value of certain services rendered by plaintiff to defendant. These facts were averred in the complaint and found by the court: Plaintiff was in the employment of defendant from the 1st day of October, 1896, to the 25th day of July, 1898; but for services rendered prior to May 1, 1897, plaintiff was paid, and they form no part of the matters here in litigation. As to what plaintiff was to receive for his services after May 1, 1897, there was no express agreement between the parties until June 20th of that year. Defendant was then engaged in the erection of a six-story building, and it was in connection with this building, and some other matters, that plaintiff was employed. The parties, on said June 20th, had a conference about what plaintiff's compensation should be during the progress of the construction of the building, which resulted in a contract that when the building should be completed and the tenants should commence to pay rent, plaintiff should be permanently employed by defendant as his agent in the management of the building, "keeping the same rented, and collecting the rents, and attending to the repairs and all other useful services in the proper management of the said building," and that defendant would pay for his services as such agent \$150 per month; and plaintiff, in consideration that he be so employed as agent after the completion of the building, and paid said compensation, agreed that he would take for his services from May 1, 1897, to the time of the completion of the building, \$60 per month. The building was completed and tenants commenced to pay rent on July 12, 1898; but on July 25th,—13 days later,—"without any reasonable or lawful cause or excuse whatever, the defendant discharged plaintiff from his employment," and has ever since refused to allow him to perform any services as such agent, or to pay him therefor. The reasonable value of the plaintiff's services from May 1, 1897, to the time of his discharge on July 25, 1898, was \$150 per month, amounting to \$2,225. Of this amount \$500 had been paid, and the court rendered judgment for the balance. * * *

As to the questions of law involved in the case, it seems clear that, as the agreement of appellant to employ respondent as agent of the building after its completion at the agreed compensation was the consideration of the latter's agreement to take \$60 per

¹⁰ Part of the opinion is omitted.

month for his previous services, the failure of appellant to so employ respondent was a breach of the contract, which released the latter therefrom, and authorized him to treat it as rescinded, and to recover for his services what they were reasonably worth. This, of course, is the general rule applicable to such case, and it is too elementary to need reference to authorities.

It is contended, however, that the rule does not apply in the case at bar, because the contract for permanent employment was only for an indefinite time, that it cannot be specifically enforced, and that it could be terminated by either party upon reasonable notice. But this is not an action to compel a specific performance of the contract for employment after the completion of the building, nor to recover compensation for his services after such completion, nor to recover future profits which respondent might have earned after that time if appellant had complied with his said promise of future employment. The action is for services rendered prior to the time when the future employment at \$150 was to commence. It is based upon the theory that appellant's promise of the future employment was the consideration of respondent's promise to do the previous work for a compensation much less than its real value, that each of said promises was part of the contract, and that appellant's refusal to perform his said promise abrogated the contract, and entitled respondent to recover the reasonable value of his past services. This theory is well founded in legal principles, as it is in considerations of justice and fair dealing. * * * Judgment affirmed.

V. Same—Master's Liability for Injuries to Servant¹¹

1. DEFECTIVE APPLIANCES

SPARKS v. RIVER & HARBOR IMPROVEMENT CO.

(Court of Errors and Appeals of New Jersey, 1907. 74 N. J. Law, 818, 67 Atl. 600.)

Action by Everett S. Sparks against the River & Harbor Improvement Company. Judgment for plaintiff. Defendant brings error.

TRENCHARD, J.¹² * * * Everett S. Sparks, the plaintiff below, was employed by the River & Harbor Improvement Company,

¹¹ For discussion of principles, see Tiffany, *Persons & Dom. Rel.* (3d Ed.) §§ 272-275.

¹² Part of the opinion is omitted.

the defendant below, as a fireman and oiler, and while at work about a double-cylinder engine upon a mud scow belonging to the defendant the engine became "stuck on center." The captain of the scow told the plaintiff to pry it off. The captain shut off the steam, and plaintiff took a crowbar and applied it to the cogwheels in the same manner as he had seen the captain and others do. While he was doing this, the steam, notwithstanding the fact that it had been shut off, escaped into the cylinder and caused the engine to start. The crowbar hit the plaintiff in the mouth, knocked him down, and rendered him unconscious. His arm caught in the cogwheels, and he was seriously injured.

At the close of the plaintiff's testimony a motion was made to nonsuit the plaintiff upon two grounds: First, that there was no negligence shown on the part of the defendant; and, second, that the danger was obvious to the plaintiff. At the end of the case a motion was made that a verdict be directed in favor of the defendant for the same reasons as were urged on the motion to nonsuit. Both of these motions were denied by the trial judge and exceptions prayed and allowed, and the case was submitted to the jury. The jury found a verdict for the plaintiff below. * * *

The first question, therefore, is this: Was the defendant company negligent? If negligent at all, the company was negligent in failing to take reasonable care to furnish plaintiff safe appliances in and about his work. The trial judge excluded from the consideration of the jury the theory of negligence because the engine was an old one and that it frequently became centered, on the ground that these facts were known to the plaintiff, and he assumed whatever risk came from them. He instructed the jury that the only negligence upon which a verdict in favor of the plaintiff could be based grew out of the character of the valve which was furnished to control the supply of steam to the steam chest and cylinder. It is the accepted law of this state that a master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs his servant. *Comben v. Belleville Stone Co.*, 59 N. J. Law, 226, 36 Atl. 473; *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619, 51 Am. St. Rep. 604.

Applying this principle to the case in hand, it is manifest that it was the duty of the defendant to use reasonable care to provide a safe valve. This duty of the master would have been discharged by providing a valve which was in common and ordinary use, and which was reasonably safe and fit for the purpose to which it was applied. *Tompkins v. Machine Co.*, 70 N. J. Law, 330, 58 Atl. 393. But there was evidence tending to show that the valve in question

was not one in common or ordinary use, and not reasonably safe for the purpose used. It was what was known as a "butterfly" valve. The expert called by the defendant said: "We haven't used them [the butterfly valves] very often only on this one dredge." The expert called by the plaintiff testified as follows: "Q. Mr. Gilpin, is a butterfly valve regarded nowadays as a safe valve to use? A. No. It is usually used as an emergency stop valve in steam practice, to put in the main pipe to shut off the valve in an emergency, when an accident occurs, or a break in the pipe, to give them time to close the regular valves, as a rule. Q. It is used, then, in conjunction with a better valve? A. Oh, yes, yes; it is very uncertain, for the simple reason that it depends on the bearing. It is a disc that sets right in the center of the line of direction of the flow of steam, and there is a stem that runs through it from one side to the other." He further testified, in effect, that a double-cylinder engine should not get on center; that, if it did, it proved a defect in the engine; and that, if the steam was shut off and the engine started suddenly when pried off center, it indicated a defective valve. The use of this valve on the engine on the mud scow in question was attempted to be justified because of the necessity for a quick-acting valve; but that does not justify the master in using an improper valve. In view of the testimony, and its various legitimate inferences, we think there was at least a debatable question raised as to the negligence of the defendant.

The second, and only remaining, question for consideration is: Was the danger obvious to the plaintiff? We think it quite clear from the evidence that the danger from the defective valve was not an obvious one. Nor is it clear from the evidence that the plaintiff had knowledge of the danger or that by the exercise of reasonable prudence he should have had knowledge of it. While a servant assumes the risk of injury from obvious defects or dangers, he does not assume the risk of injury from defects and dangers which are not obvious and of which he had no knowledge, and could not observe and know by the exercise of ordinary care. *Comben v. Belleville Stone Co.*, 59 N. J. Law, 226, 36 Atl. 473; *Atha & Illingworth Co. v. Costello*, 63 N. J. Law, 27, 42 Atl. 766. There was testimony tending to show that the plaintiff had no knowledge of steam valves or of how engines were constructed or operated or of the mechanical principles involved, and that he had had no instructions concerning those matters. Where there is a fair dispute in the evidence, or two classes of conclusions can reasonably be reached from it, whether the injury to the servant was the result of the failure of the master to exercise the care required to provide proper machinery and appliances for the use of the servant, or whether the injury was the result of obvious danger or risk to the servant, or the want of ordinary care on his part to observe dangers within

his knowledge, or of which he ought to have known in the exercise of such care, then a case is made which should be submitted to the jury for their determination. *Comben v. Belleville Stone Co.*, 59 N. J. Law, 226, 36 Atl. 473.

Tested by that rule, the present case was properly submitted to the jury. An examination of the charge discloses that it was accurate and proper in all respects. The result is that the judgment below should be affirmed.

2. ASSUMPTION OF RISK

CHOCTAW, O. & G. R. CO. v. JONES.

(Supreme Court of Arkansas, 1906. 77 Ark. 367, 92 S. W. 244, 4 L. R. A. [N. S.] 837.)

Action by Ebenezer M. Jones against the Choctaw, Oklahoma & Gulf Railroad Company. From a judgment for plaintiff, defendant appeals.

RIDDICK, J.¹⁸ This is an appeal by a railroad company from a judgment against it for damages for an injury to one of its employés while he was acting under the orders of a foreman in charge of the work upon which plaintiff was engaged at the time of his injury. The plaintiff and three or four other workmen were on the top of a wooden structure erected as a support for an iron rock crusher. The heavy iron part of the rock crusher was lifted into position by means of a "traveler" with a crane attached, worked by a steam engine. In placing the top of the rock crusher in position the workmen had also to use a "bent." This "bent" consisted of two upright pieces and a cross-piece some 10 or 15 feet long, connecting these two uprights, all of heavy timbers securely nailed and fastened together. The bottom of these two uprights or legs of the bent were fastened to the top of the wooden structure, on which the rock crusher rested. After the bent had served its purpose the foreman ordered it removed. When this order was given some one suggested that a rope be used, so that it could be lowered gradually. But the foreman said that it was unnecessary to use a rope, and ordered the bent to be pushed over and thrown down. As it was pushed over the top of the upright or leg of the bent next to where the plaintiff was at work caught on a bolt projecting from the "traveler." As the other side of the bent had nothing to stop or control it, it was pushed or fell forward; the side

¹⁸ Part of the opinion is omitted and the statement of facts is abridged.

next to plaintiff catching on the projecting bolt caused the bottom of the leg on that side to kick or fly back. It struck plaintiff, knocked him to the ground, and caused him serious injury, on account of which he recovered judgment for damages, and the main question is whether the facts support the judgment.

The liability of the master for injuries to servants rests primarily on the broad principle of law that where there is fault there is liability, but where there is no fault there is no liability. 1 Bevens on Negligence, 734. In this case we may say that, as the foreman having charge of the work for the defendant stood in its place as its representative, if he by negligence while acting as foreman caused the injury, the plaintiff can recover compensation therefor from the defendant, unless the plaintiff was guilty of contributory negligence, or unless the injury resulted from a risk assumed by plaintiff. The defendant not only denies that it was guilty of negligence, but it set up both contributory negligence and assumption of the risk by plaintiff as defenses to the action in this case. There is, of course, a distinction between the defense of assumed risk and that of contributory negligence. The defense of contributory negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable when, though the defendant has been guilty of negligence, yet the direct or proximate cause of the injury is the negligence of the plaintiff, but for which the injury would not have happened. It applies when the plaintiff is asking damages for an injury which would not have happened but for his own carelessness. On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid.

The defense of assumed risk comes within the principle expressed by the maxim "Volenti non fit injuria." This defense does not impliedly admit negligence on the part of the defendant and defeat the right of action therefor, as the defense of contributory negligence does; for, where the injury was the result of a risk assumed by the servant, no right of action arises in his favor at all, as the master owes no legal duty to the servant to protect him against dangers the risk of which he assumed as a part of his contract of service. *Narramore v. Cleveland R. R. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68. In other words, the defense of assumed risk rests on the fact that the servant voluntarily, or at least without physical coercion, exposed himself to the danger and thus assumed the risk thereof. Having done this of his own accord, he has no right, if an injury results, to call on another to compensate him therefor, whether he was guilty of carelessness or not. Smith

v. Baker, 1891 Appeal Cases (Eng.); opinion of Lord Bowen in Thomas v. Quartermaster, 18 Q. B. Div. (Eng.) 685.

But, though the defenses of contributory negligence and assumed risk are separate and distinct, yet it frequently happens that they are both available in the same case and under the same state of facts. For instance, as we have stated, a servant assumes all the risks ordinarily incident to the service in which he is employed, and it is also true that he cannot recover for an injury caused by his own negligence. Now it may turn out that the injury of which the servant complains was not only due to one of the ordinary risks which the servant assumed, but that it was also caused in part by his own negligence. In dealing with such a case it is, so far as results are concerned, immaterial whether it be disposed of by the courts on the ground of assumed risk or contributory negligence, for either of them make out a good defense. For this reason the distinction between these two defenses is not always brought out in the reported cases; it being often unnecessary to do so. We have thought it well to point out the distinction between them to avoid any confusion of the law in its application to the facts of this case. In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and when it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them, and if he negligently fails to do so he will still be held to have assumed them.

The decision in the recent case of Grayson-McLeod Co. v. Carter, 76 Ark. 69, 88 S. W. 597, rests on that ground, as do many other cases found in the Reports. But the servant is not presumed to know of risks and dangers caused by the negligence of the master after he enters the service, which change the conditions of the service. If he is injured by such negligence he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on consent, but, if the injury was caused in part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk. Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611; Smith v. Baker, 1891 Appeal Cases.

Now the injury in this case did not result from one of the ordinary risks of the employment which a servant of full age and experience must be presumed to have known, whether he did so or not. But, as the jury found, it was brought about during the

course of his service by the negligence of the foreman, who had charge of the work and in that respect represented the defendant. Where the condition of the service is thus altered, and the servant is brought face to face with a danger of that kind not ordinarily incident to the work, then, as before stated, new questions are presented. The plea of the master that the servant assumed the risk is met in such a case by the answer that the danger arose from the master's own negligence, which is not one of the risks assumed by the servant. This being so, the master, to make good his defense of assumed risk, must go further and show that the servant voluntarily subjected himself to the new danger with full knowledge and appreciation thereof; for such risk constitutes an addition to those ordinarily incident to the service, and there is no presumption that he had knowledge of it, or assumed it.

This question was thoroughly considered and discussed by the judges of the House of Lords of England in the case of *Smith v. Baker*, Appeal Cases 1891. In that case the plaintiff was with other workmen of defendant engaged in drilling holes in rock for the purpose of blasting. Another set of workmen were, by means of a movable crane operated by a steam engine, moving the stones that had been blasted. These stones were often without notice swung over the heads of plaintiff and those working with him. He was aware of the danger, but continued at work without protest, and was afterwards injured by a stone dropping upon him. In discussing the question as to whether the plaintiff assumed the risk by continuing at work under those circumstances, the judges called attention to the fact that the maxim upon which the rule of assumption of risks was based was not "*Scienti non fit injuria*," but "*Volenti non fit injuria*." A majority of them therefore concluded that the mere fact that the servant remained at work after discovering the danger to which he was exposed did not authorize the court to say as a matter of law that he consented to assume the risk. They held that whether he did so or not was under the facts of that case a question for the jury.

The justness of this decision has been recognized by some of the American courts. *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611. But, though this decision of the highest English court seems to be logically sound, yet the law in this country, as settled by numerous decisions, is to some extent different. The rule here seems to be that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so by order of his superior, must bear the risk. In other words, even though he may perform the work unwillingly under orders from his superior, yet if there was no physical compulsion, and if he knew and appreciated the danger thereof, he will in law be treated as having elected to bear the risk, and can-

not hold the employer liable if injury results. *Telephone Co. v. Woughter*, 56 Ark. 206, 19 S. W. 575; *Ferren v. Old Colony R. R.*, 143 Mass. 197, 9 N. E. 608; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501; *Stiller v. Bohn Mfg. Co.*, 80 Minn. 1, 82 N. W. 981; *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Ficket v. Fibre Co.*, 91 Me. 269, 39 Atl. 996; *Texas & Pacific R. R. Co. v. Swearingen*, 196 U. S. 57, 25 Sup. Ct. 164, 49 L. Ed. 382; *C. Ok. R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188.

But plaintiff in this case exposed himself to the danger in obedience to an order of the foreman. As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work. But, as plaintiff was busily engaged in work which required his attention, we think it was open for the jury to say that he did not know of or fully appreciate the danger, and that therefore he did not, by continuing at work, assume the risk of injury to which he was exposed by the carelessness of the foreman. Taking into consideration the fact that it would probably have been safe to have pushed the "bent" over without the use of a rope to control it, but for the fact that there was a nut projecting from the traveler which was liable to catch one side of the bent, that this danger escaped the attention of the foreman whose duty it was to guard against it, and that plaintiff's attention was distracted more or less by his work, we think it exceedingly probable that he not only did not assume the risk caused by the act of the foreman in ordering the bent pushed over without a rope attached to control it, but that he was not even aware of the danger until too late to escape. He knew, of course, that the order had been given to push the "bent" over without the use of a rope; but we think it was open for the jury to find that he did not know and appreciate the danger to him that this order involved, and that therefore he did not, by remaining at work, assume the risk. *Telephone Co. v. Woughter*, 56 Ark. 211, 19 S. W. 575; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501; *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Stiller v. Bohn Mfg. Co.*, 80 Minn. 1, 82 N. W. 981; *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425; *Fickett v. Fibre Co.*, 91 Me. 269, 39 Atl. 996; *Shearman & Redfield on Neg.* § 214.

The next question is whether or not plaintiff was guilty of contributory negligence. Now in this case, as we have before stated, the plaintiff when injured, was acting in obedience to an order of

the foreman in charge of the work, who represented the defendant company. The order of the foreman to push the "bent" over carried with it an implied assurance that the act could be done with reasonable safety; for it is the duty of the master or his representative to use due care, and not to order the servant to perform an act that he knows to be unnecessarily dangerous. The servant has the right to rely upon the judgment of the master, unless the danger is so obvious that no prudent man would incur it under like circumstances. For this reason we do not think that, because the plaintiff and the foreman under whom he was working were both in a position to have discovered the danger that caused this injury, it necessarily follows that, if one was negligent, both were negligent. It is true that they were both held to the exercise of ordinary care only; but what is ordinary care may vary with the circumstances and with the duty required, and the duty required of these men and the circumstances under which they acted were different.

The plaintiff was actually engaged in work under the direction of the foreman. When the "bent" was ordered pushed over, it became necessary for him to unfasten the brace by which it was held in position and to draw the nails by which the end of the leg of the brace was fastened to the structure on which it rested. This required him to look down, instead of upwards. He completed this work just as the "bent" began to fall. Up to that time his attention was necessarily directed to his work. But the foreman was doing no labor himself. He was directing the labor of the plaintiff and others. In order to do this he was standing on the side of the hill, a few yards away from the structure, where he could overlook and direct the work. It was his duty, before ordering the "bent" thrown down, to ascertain that the execution of his order involved no unnecessary danger to the men engaged in the work. When we consider that the plaintiff had the right to rely upon the performance of this duty by the foreman, and that plaintiff's attention was more or less required by the work he was doing, it seems very clear under the facts of this case that the jury were justified in finding that the foreman was guilty of negligence, but that the plaintiff was not. * * * Judgment affirmed.

MURPHY v. GRAND RAPIDS VENEER WORKS.

(Supreme Court of Michigan, 1906. 142 Mich. 677, 106 N. W. 211.)

Action by Maggie Murphy, as administratrix of James Murphy, deceased, against the Grand Rapids Veneer Works. There was a judgment for defendant, and plaintiff brings error.

McALVAY, J.¹⁴ Defendant owned and operated a veneer manufactory in the city of Grand Rapids. In the four-story building, known as "Mill No. 1," in which this business was conducted, was an elevator used in connection with the business, located in a brick shaft outside and on the south side of the factory. The south wall of this shaft is built thicker at the base than at the top. The elevator platform is 14 feet in length north and south, and 7 feet in width east and west. At the first floor this platform fills the entire shaft. At the third floor, on account of the wall being not so thick, there is a space between the south end of the platform and the south wall 14 inches wide by 7 feet long. Thirty-three inches above the platform of the elevator when at this floor, there is fastened, as a stay upon the top of the sides of a sliding door frame which project up from the story below, a board 4 feet 9 inches long, and 3 $\frac{3}{4}$ to 5 inches wide. It extends east and west, and its south edge is 8 inches north from this south wall. This sliding door closes an opening in the south wall of the elevator shaft in the story below. The shaft was well lighted. The elevator platform was smooth, matched flooring.

Plaintiff's decedent had worked for defendant company three months. He had charge of and operated this elevator for about six weeks, and, with another man, during this time worked in taking stock up and down the elevator from one floor to another to and from the dry kilns. A truck was used to carry the material. It was 17 inches high, and upon the top or body, which was 61 inches long by 39 inches wide, were laid two boards about 10 feet in length and 9 inches wide, placed two feet apart. Plaintiff's decedent was within a few days of 20 years old, weighed 140 pounds, and was of slender build. He was a steady and ordinarily intelligent workman. On April 20, 1903, while engaged in this work with the elevator at the third floor, the accident occurred. The elevator was locked, and this young man was starting to go down after another load of stock, and was drawing the truck onto the elevator with his back towards it. He whistled to his partner to go down with him. He was stooping over with his hands holding the boards on the truck pulling it. He was backing slowly and carefully. He suddenly disappeared, falling through this opening on the south side of the shaft about 50 feet to the bottom. He died

¹⁴ Part of the opinion is omitted.

in a few hours from the injuries received from the fall. Nobody saw exactly how the accident occurred. * * *

As to the construction and dimensions of this elevator shaft and platform, and the size and location of this opening through which Murphy fell, there is no dispute. At the close of plaintiff's case, defendant by its counsel requested that the court direct a verdict for defendant, on the ground that plaintiff, as appeared from the evidence, had assumed the risk of his employment, and was guilty of contributory negligence. Such verdict was accordingly directed, upon the ground that Murphy had assumed the risk of the employment.

In determining the question as to whether the doctrine of the assumption of the risk by the servant is to be applied in this case, we must first consider whether or not a statutory duty, under section 5 of Act No. 113 of the Public Acts of 1901, was imposed upon defendant, a neglect of which duty resulted in the injury to plaintiff's decedent. That part of section 5 of this act which is claimed to impose this duty provides: "Sec. 5. It shall be the duty of the owner, agent, or lessee of any manufacturing establishment where hoisting shafts or well holes are used, to cause the same to be properly inclosed and secured." The other provisions of the section relate to the requirement of automatic doors or gates at all elevator openings, and for the annual inspection by state officers of elevator apparatus.

The contention of defendant is that this statutory duty imposed was clearly for the purpose of preventing people from accidentally falling in from the outside. May it not be said that the Legislature considered the safety of employés whose duty brought them continually in contact with these dangerous places on the inside as well as on the outside of elevators? That the legislative intent was to protect everybody who might be in danger of injury? If the construction insisted upon by the defendant is given, then this elevator shaft built outside the building with doors opening into it from the different floors was properly inclosed and secured, and no further duty was imposed upon defendant. No argument is necessary to show that an opening 14 inches wide and 7 feet long between the edge of an elevator platform and the wall of the shaft, if not inclosed, is an unsafe and dangerous place to every person who goes up or down on that elevator. If the statute requires only such inclosure and security as will prevent people from the outside from falling in, then this space between the platform and the wall might be of any dimensions.

In the case at bar it may be well said that this shaft on the south side was never inclosed and secured. This space was left by building a lighter wall for the upper stories. It was of no use or necessity for the conduct of business. But whether a shaft is built

within or without a manufactory, our construction of the statute is that it required such shaft to be properly inclosed and secured to protect all who had occasion to use it, and that in this case that statutory duty had not been performed by defendant.

This court has held that the assumption of risk by the servant arises from the contract of employment, and the doctrine cannot be applied where a statutory duty has been neglected, for the reason that a master cannot legally contract to violate a statute. *Sipes v. Mich. Starch Co.*, 137 Mich. 258, 100 N. W. 447, citing *Narramore v. Railway Co.*, 37 C. C. A. 500, 96 Fed. 298, 48 L. R. A. 68.

Upon this question these cases rule the case at bar. * * *

Judgment reversed.

3. NEGLIGENCE OF FELLOW SERVANTS

LOUISVILLE & N. R. CO. v. BROWN.

(Court of Appeals of Kentucky, 1908. 127 Ky. 732, 106 S. W. 795, 13 L. R. A. [N. S.] 1135.)

Action by Harry Brown against the Louisville & Nashville Railroad Company. There was a judgment for plaintiff, and defendant appeals.

CARROLL, J.¹⁵ * * * Appellee, who was a head brakeman on one of appellant's freight trains, while riding in the engine, was seriously injured in a head-on collision between the engine in which he was riding and one of appellant's work trains. * * * It was the duty of the engineer and conductor in charge of the work train to know that proper measures had been taken to flag the freight, or notify it that the work train was on the track. They knew the freight was due, and that they were on the main track on its time. Although the engineer testifies that he directed a brakeman to flag the freight, and supposed he had done so, his attempted performance of duty will not relieve the company from liability for the accident. The conductor and engineer were in control of the work train, and were charged with the duty of taking every possible precaution to see to it that timely warning was given to the approaching freight. They, as well as the brakeman, were guilty of gross negligence, although the company would be liable to appellee if they, or the brakeman alone, had only been guilty of ordinary neglect. Neither the conductor nor engineer on the work train, or the brakeman who participated in their negligence and equally with them was guilty of a failure to discharge his duty,

¹⁵ Part of the opinion is omitted.

were fellow servants of appellee in the sense that appellee could not recover for their negligence.

It has been frequently ruled by this court that a servant for injuries not resulting in death cannot recover from the master for the ordinary negligence of his superior officers. *Kentucky Distilleries & Warehouse Co. v. Schrieber*, 73 S. W. 769, 24 Ky. Law Rep. 2236; *C., N. O. & T. P. Ry. Co. v. Palmer*, 98 Ky. 382, 33 S. W. 199; *Greer v. L. & N. R. R. Co.*, 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; *Linck's Adm'r v. L. & N. R. R. Co.*, 107 Ky. 370, 54 S. W. 184. But this doctrine is limited in its application to cases in which the servant is injured by the negligence of the superior officer who has immediate control of or supervision over him. To illustrate: If appellee had been injured by the negligence of the engineer or conductor on his train, he could not recover damages against the company unless they were guilty of gross neglect. The reason of this rule is that the servant, when he engaged to work, undertakes that he will assume the ordinary risks incident to the employment, and will not hold the master liable for the ordinary negligence of those employés with whom he is engaged, whose actions and conduct he can observe and, if necessary, guard against.

This doctrine of assumed risk by the servant has been further extended by this court until now it is well established that a servant cannot recover from the master for injuries inflicted by the negligence of a fellow servant in the same grade of employment engaged in the same field of labor, and associated or working with the injured servant, however gross the negligence of the fellow servant may be. Hence, if appellee had been injured by the negligence of a fellow brakeman on the train he was working on, without any fault on the part of the conductor, or engineer, or other superior, or breach of duty on the part of the company, he could not recover in this action. In *L., C. & L. R. Co. v. Cavens' Adm'r*, 9 Bush, 559, the proposition before us was under consideration by the court, and it was said: "It is well settled that where one enters into the service of another he assumes to run all the ordinary risks pertaining to such service; and this means only that he cannot recover for any injury that his employer, by the exercise of ordinary care and prudence, could not provide against. And it is equally as well established that, where a number of persons contract to perform service for another, the employés not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of his duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. Public policy requires that, where the laborers are coequals and engaged in laboring in the same field, or on the same railroad train, or in

any other employment, each should exercise proper care in the conduct of the business, and look to it that his collaborer does the same thing; and, when he is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution." And this principle was fully recognized and applied in *L. & N. R. R. Co. v. Sanders' Adm'r*, 44 S. W. 644, 19 Ky. Law Rep. 1941; *Volz v. C. & O. Ry. Co.*, 95 Ky. 188, 24 S. W. 119; *Dana v. Blackburn*, 121 Ky. 706, 90 S. W. 237, 28 Ky. Law Rep. 695; *Martin v. Mason & Hoge Co.*, 91 S. W. 1146, 28 Ky. Law Rep. 1333; *Pitts, Hankins & Trundell v. Centers*, 98 S. W. 300, 30 Ky. Law Rep. 311.

But when the servant is injured by employés of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negligence and carelessness he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds. And so appellee, whose injuries were directly caused by the negligence of the employés on the work train, may recover from the company, without regard to which one of them was guilty of the neglect that resulted in his injuries.

The distinction between the liability of the master for injuries to the servant, when the injury is caused by the neglect of those engaged directly with the servant, and when it is due to the carelessness of employés not immediately associated with him, was first recognized by this court in *L. & N. R. R. Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486, in a case against the company to recover damages for personal injuries inflicted by the negligence of the engineer, where it was said: "The company is responsible for the negligence or unskillfulness of its engineer as its controlling agent in the management of its locomotives and running cars; and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient. As to subordinate employés associated with the engineer in conducting the cars, the negligence must be gross. As to employés in a different department of service unconnected with the running operations, ordinary negligence may be sufficient."

And subsequently this distinction was more clearly expressed and applied thus:

In *Kentucky Central Ry. Co. v. Ackley*, 87 Ky. 278, 8 S. W. 691, 12 Am. St. Rep. 480, the action was brought for personal injuries

received by Ackley, who was an engineer upon a passenger train, resulting from a collision with a freight train of the company. It was contended by the company that, as the injuries were caused by the negligence of employés in the same grade of employment as the person injured, there could be no recovery. But the court, in rejecting this contention, quoted with approval the principle announced in *L., C. & L. R. Co. v. Cavens' Adm'r*, *supra*, saying: "It is argued in that case that the rule should be applied that when a number of persons contract to perform a service for another, the employés not being superior or subordinate to each other in its performance, and one is injured through the negligence of another, they are to be regarded as the agents of each other, and no recovery can be had against the employer. But it was held that a different rule prevails when the employment is several, and when one is subordinate to the other, or occupies such a position in the service with reference to his collaborer as precludes him having any control over his actions or the right to advise even as to the manner in which the service is to be performed."

In *Illinois Central Ry. Co. v. Hilliard*, 99 Ky. 684, 37 S. W. 75, Hilliard, who was a conductor, was injured by the giving way of a ladder on one of the cars in his train. The company requested the court to say to the jury that the car inspector, whose duty it was to keep the ladders in repair, and the conductor, were fellow servants engaged in the same line of service, and that Hilliard could not recover unless the jury believed the inspector guilty of gross negligence. This court, in commenting on this request, said that the instruction was properly refused, the conductor and inspector "acted in different spheres, and neither could or was required to know whether the other was properly doing his duty," and held that the company was liable for the ordinary negligence of the inspector.

In *L. & N. R. R. Co. v. Lowe*, 118 Ky. 260, 80 S. W. 768, 65 L. R. A. 122, *C., N. O. & T. P. Ry. Co. v. Hill's Adm'r*, 89 S. W. 523, 28 Ky. Law Rep. 530, and *L. & N. R. R. Co. v. Hiltner*, 56 S. W. 654, 21 Ky. Law Rep. 1826, the rule announced in the Collins, Cavens, and Ackley Cases was followed. In the cases of *L. & N. R. R. Co. v. Robinson*, 4 Bush, 507, *L. & N. R. R. Co. v. Rains*, 23 S. W. 505, 15 Ky. Law Rep. 423, and *Robinson v. L. & N. R. R. Co.*, 24 S. W. 625, 15 Ky. Law Rep. 626, it was apparently held that an employé on one train could not recover from the company for the negligence of the employés on another train unless their negligence was gross; but these cases may now be regarded as having been overruled by the later ones above referred to, and it must be considered as no longer an open question in this state that there may be a recovery in a case like the one before us, although the negligence of the person causing it was ordinary. Hence the

court correctly instructed the jury that, if they believed from the evidence that the injury to plaintiff's foot was the direct result of negligence on the part of the agents or servants of the defendant in charge of the work train, they should find for the plaintiff. * * * For error in the amount of damages, the judgment must be reversed.

MARQUETTE CEMENT MFG. CO. v. WILLIAMS.

(Supreme Court of Illinois, 1907. 230 Ill. 26, 82 N. E. 424.)

Action by Grant Williams against the Marquette Cement Manufacturing Company for damages for personal injuries. There was a judgment for plaintiff, which was affirmed by the Appellate Court, and defendant appeals.

CARTWRIGHT, J.¹⁶ * * * There were a number of motors on the main floor of the cement factory, and one of them operated what was called a "pan conveyor" in the basement. The appliance for starting and stopping this motor was in the basement, where it could not be seen from the motor. To start and stop the motor it was necessary to go down in the basement and throw a switch, in order to let the current of electricity into the motor or shut it off. On June 30, 1903, in the forenoon, plaintiff went to this motor and saw that the brush was out of the brush holder, and the brush holder was dragging in the commutator, and the ring was stopped in the motor. In that condition the motor would soon burn up and destroy valuable machinery. Plaintiff then went to John Coleman, the foreman of the mill, and told him the condition of the motor; but Coleman refused to have the motor stopped to put it in order, on account of the work that was being done by it at that time. Plaintiff then went to Fred McNeil, the electrician in charge of the electrical department, and told him that if he did not go up there and attend to the motor it would be burned out in a few minutes. McNeil went with plaintiff and looked at the motor, and then had a talk with Coleman near by, after which he told the plaintiff to watch the motor a few minutes and then stop it, and he would see that no one would start the motor or interfere with the plaintiff until he had fixed it. McNeil then left, and plaintiff went down in the basement and stopped the motor by throwing the switch. William Crockett was in charge, under Coleman, the mill foreman, of the pan conveyor and the appliance for letting clinkers into the conveyor. Crockett had charge of the switch and starting block, and was standing near by. After the plaintiff stopped the motor he told Crockett that he was working on the motor and not to start it again until he told him. Plaintiff

¹⁶ Part of the opinion is omitted.

ran upstairs and to the motor, and commenced to make the necessary repairs. In doing so he reached his hand in to feel whether the oil plug was tight, or not, where it had been leaking oil, and some one started the motor, resulting in the injury.

One reason presented why the court ought to have given the instruction is that the negligence which caused the injury was the failure of McNeil to see that the motor was not started, and his negligence was that of a fellow servant. There is no evidence as to who started the motor, but Crockett said he did not do it. Whoever it was, there is no claim that he was a fellow servant of the plaintiff, and under the circumstances the act was a wrongful and negligent one, and was an efficient cause of the injury. Crockett was not a fellow servant of the plaintiff, and was the person in the immediate charge of the pan conveyor and switch. He was notified that plaintiff was working on the motor and that it was not to be started until he was through. So far as McNeil was connected with the injury, the evidence did not tend to prove that he was a fellow servant with the plaintiff in reference to this matter. The injury did not result from the exercise of authority by McNeil over the plaintiff, but it was the duty of the plaintiff to follow the directions of McNeil as his superior, and the assurance of McNeil that the motor should not be started was not the act or assurance of a fellow servant, but was that of one having authority. While it appears that McNeil and the plaintiff may have worked together sometimes as fellow servants, they were not co-operating with each other in performing any act of service in relation to this motor.

It is further urged that McNeil had no authority to order the motor shut down. The evidence for the plaintiff was that, after Coleman said he would not shut it down, McNeil talked with Coleman a few minutes and then told plaintiff to shut it down. Plaintiff testified that he did not hear the conversation, and that they were about 25 feet from him. The court could not say that plaintiff did not have good reason to believe McNeil was authorized at that time to have the motor stopped. * * * Judgment affirmed.

QUINLAN v. LACKAWANNA STEEL CO.

(Court of Appeals of New York, 1908. 191 N. Y. 329, 84 N. E. 73.)

Action by Patrick Quinlan against the Lackawanna Steel Company. From a judgment of the Appellate Division (107 App. Div. 176, 94 N. Y. Supp. 942), affirming a judgment entered on a non-suit, plaintiff appeals.

HAIGHT, J. This action was brought to recover damages for a personal injury. The plaintiff was in the employ of the defendant,

engaged in operating an electric crane in the defendant's plate shop. The building was about 75 feet in width and several hundred feet in length. The crane was about 30 feet high, constructed in such a manner that it could be run upon railroad tracks lengthwise through the building, having at the top heavy steel girders running crosswise of the building, upon which a carriage with tackle could be run back and forth, so that the material which was used in the process of manufacture in the shop could be hoisted up and carried to any part of the building in which it was to be used. About 15 feet from the ground, upon one end of the crane, was a coop which was approached by a ladder, in which the operator stood, and from which place he operated the crane by electric power furnished through wires by means of switches and levers contained in the coop. On the day in question he had been operating the crane for an hour or two, and then he threw the switch open so as to cut off the electricity from the wires above, ascended the crane to the carriage above for the purpose of oiling the bearings and while thus engaged one Knapp, another employé of the defendant, entered the coop, turned on the electricity, causing the plaintiff to receive a shock from which he fell from the carriage above to the floor beneath, receiving the injuries for which this action was brought.

It appears from his testimony that one Greenough was the superintendent in charge of this and other shops of the defendant in so far as their manufacturing department was concerned, and that Knapp was a foreman under him in charge of the plate shop in which they had 60 or 65 men engaged at work; that Greenough visited the shop from time to time, gave his orders to Knapp with reference to the work that was to be done, and that Knapp gave directions to the men upon the floor of the shop as to the work that each was to do; that, when they had iron or other material that was to be carried from one part of the shop to another by means of a crane, he signaled the plaintiff in the coop of the crane, whose duty it was to then move it to the point where the material was piled, and after it had been hitched on to the tackle to elevate it from the floor and carry it to the place at which it was designed to be landed. It further appeared that there was another department in the defendant's service known as the "electrical department," of which one Tower was the superintendent, who had charge of the electrical machines; that he employed the plaintiff with others as cranemen in the so-called electrical gang, and that the employés of the electrical gang were required to report to him every morning and at the close of their day's work; that he assigned the plaintiff to the crane in question, and placed its operation in his hands, but he was to receive orders from Knapp as to time and

place that material was to be moved by means of the crane. During the time that the plaintiff was on duty no other person operated the crane.

It is thus apparent that the plaintiff was employed by reason of his familiarity with the use of electrical power, and that he was assigned to the work of operating this particular electrical machine by reason of his experience, and that it became his duty, and his alone, to apply and cut off the power and operate the crane in the performance of the work for which it was designed. It is also apparent that Knapp, although a foreman in the shop having charge of the work that was to be done by the men employed in the manufacturing department, had no duty to perform with reference to the operation of the crane other than to signal to the operator as to the place to which it was to be moved and the material to be carried. It does not appear that he possessed any knowledge or had had any experience with reference to the use of electricity, or had any right or authority whatever to enter the coop, and there interfere with the electrical appliances by which the crane was operated. We therefore conclude that at the time he entered the coop of the crane and turned on the power he did that which he was unauthorized to do and which was not within the scope of his employment, and consequently, it was not an act of superintendence within the meaning of the employer's liability act (Laws 1902, p. 1748, c. 600).

The judgment should be affirmed, with costs.

GUILMARTIN v. SOLVAY PROCESS CO.

(Court of Appeals of New York, 1907. 189 N. Y. 490, 82 N. E. 725.)

Action by Dennis Guilmartin against the Solvay Process Company. From an order of the Appellate Division (115 App. Div. 794, 101 N. Y. Supp. 118), reversing a judgment of the Trial Term for plaintiff and granting a new trial, plaintiff appeals.

CULLEN, C. J. This action is brought under the Employer's Liability Act, Laws 1902, p. 1748, c. 600, servant against master, to recover damages for personal injuries. The defendant was engaged in the manufacture of soda ash and similar products. The plaintiff had been in defendant's employ for a number of years, and for the last portion of the time his duty was to oil the machinery. At the time of the accident a belt in defendant's factory, running from the main shaft to a counter shaft, had become so loose as to wind around the pulley on the shaft. The belt seems to have been stronger than the attachment of the pulley to the shaft, and after it had been drawn as taut as possible from the counter shaft

the pulley commenced to revolve on the shaft. To remedy this condition of the machinery it was necessary to loosen the belt. One Mullin was the foreman of the shift or gang to which the plaintiff belonged. Mullin had power to stop the machinery in case of accident or emergency. On being informed of the accident he had the movement of the engine slowed to a certain extent, but did not have it stopped, and then directed the plaintiff, with other workmen, to cut the lacing of the belt; he personally joining in the work. After the belt was cut he directed one of the workmen to throw the loose end on the floor. The shaft pulley, being relieved from the strain of the taut belt, again revolved with the shaft and commenced to wind up the belt, the loose end of which struck the plaintiff. He was drawn over the shaft and received injuries which resulted in the loss of his leg.

Two questions were submitted to the jury: First, whether Mullin was a person whose sole or principal duty was that of superintendence; second, whether it was negligent not to have stopped the machinery when the plaintiff was put at work to repair the injury to the belt and pulley. The jury found a verdict for the plaintiff. A motion for a new trial was made and denied. From the order denying that motion and the judgment entered on the verdict an appeal was taken, and both were reversed by the Appellate Division by a divided court, and a new trial granted.

The order of reversal states that it was made solely on questions of law, the facts having been examined, and no error found therein, and hence an appeal from the order lies to this court. The ground on which the Appellate Division placed its decision was that the negligence of Mullin in failing to stop the engine, if negligence it was, was the negligence of a fellow servant in a detail of the work for which, under the decisions in *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *McCosker v. Long Island Railroad Co.*, 84 N. Y. 77, and *Foster v. International Paper Company*, 183 N. Y. 50, 75 N. E. 933, the master was not liable, and that therefore the defendant's motion to dismiss the complaint made at the close of the evidence should have been granted. We deem this view of the Appellate Division erroneous. The two earlier cases cited by the court below arose before the enactment of the employer's liability act. If the accident in the third case occurred after the enactment of that statute, the action was not brought under that act.

Therefore the decision in none of the cases disposes of the present case, which is substantially controlled by our recent decision in *McHugh v. Manhattan Railway Company*, 179 N. Y. 378, 72 N. E. 312, and *Harris v. Baltimore Machine Elevator Works*, 188 N. Y. 141, 80 N. E. 1028, which were based on the employer's liability act. That statute, as said by Judge Gray in the later case, "gave an additional cause of action, because it prescribed that a master

shall be liable for the negligence of the superintendent or the person acting as such. At common law such a liability was not recognized, unless the superintending servant was the alter ego of the master with respect to the work." To render the master liable the negligence must not only be on the part of the person who is acting as superintendent, but also in an act of superintendence. But if the act be of that character the fact that in a sense it is a detail of the work will not relieve the master from liability. In the prosecution of many, if not most, works, superintendence is a detail of the work, in the accurate use of that term. It is often so denominated in the older cases, and properly so, because before the statute it was unnecessary to distinguish between negligence of a superintendent and that of a collaborer of the same grade as that of the person injured so far as any liability of the master was involved.

The statute has changed this. In the McHugh Case, the defendant was held liable for the negligence of a train dispatcher in starting a train. The dispatcher performed that act, doubtless, scores of times a day, and its performance was a mere detail of his ordinary day's work. Therefore the question in any case brought under the statute is not whether the negligent act is a detail of the work, but whether it is a detail of the superintendent's part of the work, or of the subordinate employés and servants. In the present case, had the foreman, Mullin, attempted to stop the engine himself, and so carelessly done the work as to cause injury to other employés, that might very well be deemed the negligence of a co-servant for which the master would not be liable, but the determination of the question whether the machinery should be stopped before the men were put to work on it was of a very different character. None of the other workmen could direct the engine to be stopped. Mullin alone had that power. His direction in reference thereto, or failure to direct, was an act of superintendence. At least, the jury was authorized to so find.

It is contended by the counsel for the respondent that the failure to stop the engine was not a negligent act, and that the accident which occurred was one which could not have been anticipated or foreseen. It requires nothing more than a perusal of the numerous accident cases found in the reports of this court to show that working on moving machinery involves great danger of personal injury. While it is true that the particular manner in which this accident occurred is quite exceptional, it is equally true that the jury was authorized to find that the work was inherently dangerous and involved liability to accident of some kind. There was evidence tending to show that stopping the machinery at the particular time would involve injury to the plant and product. This might justify a failure to stop the engine, but the evidence on the

subject simply presented a question of fact for determination by the jury.

The objection that the plaintiff assumed the risk is answered by the provision of the statute, which enacts: "The question whether the employé understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict contrary to the evidence." The Appellate Division might have reversed the judgment on the ground of assumed risk, but in affirming the facts it has refused to exercise that power.

The order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed, with costs in both courts.

4¹ Defenses (cont.)

G.- Wife must ~~not~~ be ^{not} husband of the master and must be able to support himself, and if he has not deserted her. WEST PUBLISHING CO., PRINTERS, ST. PAUL, MINN. 22176

H.- ~~Intentional~~ Intercourse for one year. CC 106
54 Cal 262 - 62 Cal 195 - 19 Cal 627

I.- Commission of a felony. CC 92

5.- Special Defenses.

A.- Commission CC 112 - 113 - 47 Cal 676 76.

B.- Collision CC 114 - 65 Cal 264 - 10 Cal 509 - 42 Cal 616 67

C.- Condonation CC 115.

1.- Must be a defense when involuntary. 102 Cal 433

2.- It is not mere forgiveness but a reconciliation, and remission of claim and extinction of master's rights. CC 116

D.- Must be with knowledge of facts. CC 120

E.- A course of offenses without an express condition is condoned only by express agreement 119 Cal 183

F.- Cause of service is reversed after condonation.

a.- By repetition of like or new cause.

b.- Or condonation is followed by amendment.

G.- Resignation CC 122

a.- Any cause for service is sufficient for

5 Cal 256 - 13 Cal 472
Cal 537 - 14 Cal 577 8 Cal 510

-8th inst. at final span, 17 Cal 537-14 Cal 577 ^{8 Cal}₅₁₀

1- Conveyed - set by marriage contract. C.R. Code
517-518
524

2nd Leg - proposed by 1865. Signifies an equal division of the marital goods upon dissolution of the marriage

15-18 mm. is necessary.

The Report Estate. (The community estate.)

128 further and before marriage or afterwards recognized by
any wife, son, or daughter. City Code 162-163

22 Rent, issues and profits of separate property 1627
32 Property acquired in exchange for sep. prop. 32 Cal 498
1874 77 Cal 222

13. Roof. also in part with dry. grounds and in part with
some. brush. in field in a kind of terrace in Co.

42 Isips. but in the spouses as separate estate 42 Isips.

Ex. when a bond upon credit 34 Cal 449 353

65 Cal 343 - 81 Cal 268 - 94 Cal 66 - 96 Cal 433
19 276 - 79 Cal 468

13 Harvard ~~now~~ give the wife her part or fortune
earns \$1 Col 261 - 102 ~~200~~ 2 1/2

2³ Add evidence to show fact of sep. profs.
when bank demands purchase with funds belonging

to the sum of one and direct conveyance of
the same to wife 31 Cal 445-42 Cal 358

6.5 Cal 343-46 En 259-31 Cal 653-40 Cal 1-358

not & Communist prop. exists

14 of all property taxes reported estimate 90 Cal 2-82

2¹ Damages for injuries to either spouse. 18 Cal 526-63 Cal 456
77 Cal 390-87 Cal 464-94 Cal 425

3rd Banquet of the sponsors. 9 Cal 476 - 26 Cal 577-66 Cal 478
180 Cal 276

12 Person in ~~if~~ not liable for husband debts

2nd EC-168-63 Col 370
Evenings of angle living apart from husband

4½ years old, 60 lbs. (minor children also)

12 But not accounted by 1/2 edge or mrg. of sep. beds of 189 Cal 55

12 donations, gifts are separate deposit. 13 On 459
26 Oct 577 - 31 Oct 49 - 14 Oct 576

35 The grain has been in an embroyo state but remains present from the condition. 7-17-59

6-1 *innotata* Böhr.

12 little initiated, and perfected during our sojourn, are generally but imperfect according to doctrine & practice - File No. 4 - Date 77-314 - M. G. -

20 Oct 317-113 well 682-15 coring

22 titles divided during and reported after death
of marriage generally held to accrue to the community.

12 under Spanish law fall into the constituency

2nd Jan Cal. Rev. Wm. King. Belongs to aep. estate.

15 Cal 322-18 w 6548-2 Cal 298-19 Cal 64160

41 C.R. 452 - 156 col. 1 - 158 col. 19

8¹ Suspense is made by suspense, suspense to perfect
are opposite ends. - Dr. Mrs. Prob. 241.

12 But 1/2 of value of investment is subject to

9½ hours, return to the other shore. 14th 6.4-1.
again by boat, for deer hunting.

but the rule says ~~in~~ ⁱⁿ ~~any~~ ^{any} ~~case~~ ^{case} ~~is~~ ^{is} ~~not~~ ^{not} ~~sup~~ ^{sup}

10² property acq. by 2010
12 20 community right confirmed

57 Col 320 : by J. W. Smith

2nd coronary rule where right compromise is adopted by

— Presumptions:

12 That prop. acq. other than a gift - bequest, devise or descent
after marriage is $\frac{1}{2}$ to the wife & $\frac{1}{2}$ to the husband 164
11-25-15 793

4 Col 200-10 Col 9 - 98 Col 35 - 151 793

2- Insurance premium payable to husband established
on jointly held husband's property. 2 case 1715

3¹ ~~had a~~ a ¹ ~~old~~ by ² ~~the~~ ³ ~~man~~ in ⁴ ~~the~~ ⁵ ~~state~~

name is John.
131-649-1162-134-113- Cir Code 575.

131 Cal 447-132 Ex 403-
42 As to which should appear to me in it, not
desirous that this should be, yet alter-

clear whether there are common or separate laws for each country.

51 air code 172 - no code
the blindness is a common man of science and can

The breeding in a common nest
proves the identity with *Leucosticte aenea* — 79 Cal 364

mass community prof. 19 Cal. 11 - 1946 304

4. Jan 1911 - 133 Cal 462.

61 Recitals in a dead city are shown by evidence to be non-existent and non-concertistic.

1. *Prima facie legal title*, 48 Cal 358 - 114 Cal 295
46 Cal 264

2. Since 1889 ~~it is~~ ^{it is} that a wife conveys to the wife
is for her separate property. *Code 164 - 28 Cal 3-8*
23 Cal 529 - 126 Cal 9 - 15 Cal 72 -

3. *note of intent and right of each spouse during the community*
Husband has dominion and power of disposition over all community
property. *172-172a - 23 Cal 238 - 12 Cal 252 - 28 Cal 4*
89 Cal 283 - 38 Cal 230 - 15 Cal 157 - 15 Cal 308 - 13 Cal 493
17 Cal 581 - 26 Cal 394 - 101 Cal 563 - 187 Cal 154 - 141 Cal 603
193 Cal 296.

1. *Person* ^{can} make gifts of a ~~community~~ community personal
property without consideration without her consent.
13 Cal 490 - 15 Cal 308 - 39 Cal 157 - 17 Cal 528 - 26 Cal 547
58 Cal 115 - 101 Cal 563 - 9 Cal 476 - 43 Cal 581

2. *own community prop.* with intent to
defraud her, 16 Cal 558 - 66 Cal 478 - 116 Cal 339.

3. *one can be convey the family furniture or clothing*
without her written consent. *172*

4. *one can be disposed of community real estate without*
her joining in the execution of the instrument except
for cause. *172* ^{or one can do this} *172a*

5. *Wife's interest during community has been said to be a*
mere expectancy. 116 Cal 337 - 16 Cal 494 - 40 Cal 35
131 Cal 447 - 17 Cal 525 - 191 Cal 601 - 70 Cal 441, 8, 11 & 3

12. *It has been said that California is distinguished from*
other community prop. states in following particulars,
1. *In Calif. community is a single entity*
2. *In Idaho it is a double ownership.*
3. *In Texas a trust - husband trustee.*
4. *Interest of the community.*

1. *It is dissolved* *172 - 186 - 147 - 148*
12. *By divorce* *15 Cal 1 - 31 Cal 33 - 63 Cal 77 - 39 Cal 164*
13. *By death of either spouse* *1401 - 1402 - 75 Cal 134*

6. *Rights and Powers of survivor. (uncertain)*

1. *Community property subject to testamentary disposition.*
Otherwise all goes to the survivor. *1401*.

56 Cal 162 - 171 Cal 6

2. *If husband is survivor he retains same power of disposition*
and control as during his lifetime *1402* *or 172*

12. *Except* *in case there is recorded a notice of the will*
of the wife and the specification of the intent claimed

3. *if his authority when she is survivor is same as an heir*
and there is a will *12 Cal 114 - 116 Cal 357 - 17 Cal 52*
18 Cal 473.

41. *Testamentary power is limited to the testator's*

18 Cal 73-18 Cal 292-21 Cal 91-40 Cal
74 Cal 243-50 Cal 133-75 Cal 134

101. - ~~Debt of the wife~~ - ~~to the husband~~
1/ Husband does not have a right in a debt of the wife
2/ ~~Can the wife be liable for the debts of the wife?~~
debt - 12 wife 20 171 171 - 160 312
35 a 171 - 20 171
3/ ~~But not the wife's separate property.~~ CC 170
24 inc 20
4/ The community property, which falls to the wife
is made after the death of the husband and is divided
? ~~Between the wife and the husband~~ by the law
CC 167, 53 inc 459, 175 2187, 137 362 273.
5/ The savings of the wife are liable for the
debt of the husband CC 165, 193 inc 762, 62 inc 390.
6/ But not the separate property of the wife
as the wife's separate property is not liable for
the debt of the husband. ~~Helping the
wife's separate property at the time of marriage and be
acquired by the husband during the time of
marriage~~ CC 171.
7/ Community property is liable for the debts of the
wife except the debts of the husband. 557
15 inc 312 - 45 inc 314
12 ~~But not the wife's separate property.~~ 23

Si...
Si...
Si...

1. - Drilling and mining.

1. The purpose of the mineral law is to regulate
or regulate from a part of our law 14 Sec 76

2. Our law is to bring in statute 87 in 2009.

3. The purpose of the law is to bring in
function.

1. In the case of account of mineral
consolidation, mining, we have to file with
most of our

1st Adultery cc 93 - 184 Cal 607

a. - In Civil there is no dis
and in Law no commis
f. - act must be voluntary



AA 000 695 820 1

2nd

Extreme Cruelty cc 94 - 14 Cal 76 - 29 Cal Ap 1
a. - Is the infliction of grievous bodily injury. 253 259-33
b. - Tending to impair health 22 Cal 359
c. - Intent to kill 14 Cal 512
d. - Grievous mental suffering is sufficient even tho
does not impair health. 22 Cal 258 - 119 Cal 183 - 95 Cal 43 - 95 Cal 47
e. - Malicious charge of adultery made in presence of third person
94 Cal 225 - 85 Cal 251 - 4 Cal Ap 726
f. - Charge of commission of act of extreme character such as
95 Cal
g. - Malicious drumbeats or other course conduct 54 Cal 362
h. - Cruelty by physical in a degree.
j. - The cruelty is of a ^{high} and such intent to injur.
k. - License for cruelty is not granted as a priv
but for protection from future injury 14 Cal 76.

3rd

Wilful Desertion cc 95-32 Cal 467 - 167 Cal 732
a. - Desertion begins with the forming of an intent during
absence or separation, but not the actual separation
b. - Separation is not necessary but
when state of mind or physical condition does not make up
residence
c. - Separation is not necessary to all in same house
you can be seen with 20 Cal 232 - 52 Cal 231 28 290 82
d. - The wife is guilty of desertion if she abandons her
husband
e. - new domicile cc 103
f. - provided the time or mode of living is not unreason
or grossly unfit.
g. - Offer to return made by guilty party either one of
several by either in deserts of the last - cc 101 cc 10
166 Cal 29 - 73 Cal 630 - 32 Cal 467 - 45 Cal 75 763 Cal Ap 5
44 Cal 617

7 - ~~Desertion~~

a. - Separation by mutual consent is not desertion 45 Cal 50
b. - Death of wife deems her free of her
desertion by mutual act cc 98
c. - Involuntary or necessary or proper absence is not
d. - Continued support during separation is not a def
e. - Action brought in less than one year.
f. - Wilful neglect to support cc 105 - 104 Cal 293.
1. - Must continue for one year
2. - Husband is required to support wife
3. - If wife is self supporting 9 Cal 165 - 168 Cal 34

